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ABSTRACT

The concepts of sovereignty and trust form the core of the American Indian Policy Review Commission's final report. The commission's responsibility, derived from PL 93-580, was to conduct a comprehensive review of historical/legal developments underlying the Indian/federal government relationship and to recommend necessary policy revisions. After considering the work of 11 task forces assigned by Congress to investigate major areas of contemporary importance to Indian people, the commission included extensive discussion of law and history in its report to provide a foundation for understanding and made 206 specific recommendations in general areas of federal Indian law, trust responsibility, federal administration, economic self-sufficiency, restoration and recognition, and urban Indians. In addition to recommendations, the commission provided chapter discussions encompassing captives within a free society, contemporary Indian conditions, distinctive doctrines of American Indian law, trust responsibility, tribal government, federal administration of Indian policy, the economics of Indian country, community services, off-reservation Indians, terminated Indians, nonrecognized Indians, special circumstances (Alaska, Oklahoma, California, land claims and aboriginal ownership), and general problems. Separate views of commissioners are included. (RS)

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ED164229

[COMMITTEE PRINT]

AMERICAN INDIAN POLICY REVIEW COMMISSION

FINAL REPORT

SUBMITTED TO CONGRESS
MAY 17, 1977

VOLUME ONE OF TWO VOLUMES

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
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[1] Served in the 94th Congress.
[2] Replaced Congressman Steiger on the Commission.

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CONGRESS OF THE UNITED STATES
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May 17, 1977

Vice-President Walter F. Mondale
United States Senate
Washington, D. C.

Congressman Thomas P. O'Neill
Speaker of the House of Representatives
Washington, D. C.

Gentlemen:

I am submitting herewith the report and recommendations of the American Indian Policy Review Commission.

The report is responsive to the provisions of P. L. 93-580 which established this Commission and charged it with the responsibility to conduct a comprehensive review of the historical and legal developments underlying the Indians' relationship with the Federal Government and to determine the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians.

The Commission's recommendations have been arrived at after a careful review by the Commission and 11 Task Forces of the Federal-Indian relationship.

The Commission's Organic Act requires that any recommendations involving the enactment of legislation shall be referred by the President of the Senate or the Speaker of the House of Representatives to the appropriate standing committee of the Senate and House of Representatives respectfully, and that such committees shall report thereon to the respective house within two years. We urge you to support early implementation of the Commission's recommendations to assure that the Federal Government's responsibility to the Indian people is met.

Sincerely,

James Abourezk
James Abourezk
Chairman

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INTRODUCTION

A history, once thought ancient and dead, has risen to challenge this generation of Americans. As never before, since the days of the last century when they were forced to fight militarily for their lands, their freedoms, and their existence, the Indian peoples of our country are today stirring both the consciousness and conscience of the Government and all elements of the Nation.

It is the fortune of this generation to be the first in our long history to listen attentively to the Indians, and thereby to begin to understand what they are saying, to recognize realistically their own points of view, as a unique part of our population, and to heed their voices for the righting of wrongs, the ending of frustrations and despair, and the attainment of their needs and aspirations as Indians and as free and proud Americans.

It is generally believed, mistakenly, that the Federal Government owes the American Indian the obligation of its trusteeship because of the Indians' poverty, or because of the Government's wrongdoing in the past. Certainly American Indians are stricken with poverty, and without question the Government has abused the trust given it by the Indian people. But what is not generally known, nor understood, is that within the federal system the Government's relationship with the Indian people and their sovereign rights are of the highest legal standing, established through solemn treaties, and by layers of judicial and legislative actions.

Perhaps someday in the future, the Indian people may return to the bargaining table to renegotiate and reshape those solemn agreements. But it must be done as equals, and not as one party coming, on its knees, pleading as inferiors.

For the Federal Government to continue to unilaterally break its agreement, especially to a people as unique to our history as are the Indians, would constitute moral and legal malfeasance of the highest order.

Today, the past must be used as a backdrop, rather than as an indictment. But it is a backdrop that explains most of what must be known about the present-day condition of Indians and their relations with the Government and the rest of the American people. It is a way of seeing into the mind of the Indian people of today. From the earliest days of European settlement in what is now the United States, and, more pertinently, since the founding of the Republic, the Indians have been subjected to ambivalent attitudes and policies by the advancing non-Indian society and, after 1789, by the United States Government itself. On the one hand, every method has been employed to force them to cease being Indians and to conform to the dominant society, while on the other hand they have been led to believe, in part and from time to time, that the Government would support their right to survive as Indians and to practice their own culture—a determination, which despite every adversity and pressure, they have maintained to this day.

They have survived. But it has been at a great cost to them. The history of social experimentation of the Indians by those who gained mastery over their lives and fortunes resulted in decades of confusion, hopelessness, and poverty, which the Indian people have asserted could never be corrected until they themselves could again be allowed to determine their own lives and, like all free Americans, manage and control their own affairs.

Today we must ask the central question: Is the American nation—now 200 years old, and 100 full years beyond the era of the Little Bighorn—yet mature enough and secure enough to tolerate, even to encourage within the larger culture, societies of Indian people who wish to maintain their own unique tribal governments, cultures, and religions?

As Felix Cohen once said:

> If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who never were Indians and never expect to be Indians fight for the Indian cause of self-government, we are fighting for something that is not limited by accidents of race and creed and birth; we are fighting for what Las Casas, Vitoria and Pope Paul III called the integrity or salvation of our own souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes which should carry us through many defeats.

The question goes far beyond that of "restitution" for past wrongs. From the misdirected present, can the United States Government redirect its relations with the American Indians to enable them to determine their own lives now, and in the future?

The question is ringing loudly in our ears today. Nor will it be stilled—today or tomorrow—until it is answered.

A POLICY FOR THE FUTURE

This final report of the American Indian Policy Review Commission represents 2 years of intensive investigative work encompassing the entire field of Federal-Indian relations. The last such investigation occurred almost 50 years ago. The conclusions of that investigation and its condemnation of the policies which had governed Federal administration over the preceding 50 years brought an abrupt shift in the statutory policies governing the Federal-Indian relations, a complete repudiation of the policies which had controlled from the late 1800's to the mid-1930's. And yet the American Indian today finds himself in a position little better than that which he enjoyed in 1928 when the Meriam Report was issued.

It has been the fortune of this Commission to be the first in the long history of this Nation to listen attentively to the voice of the Indian rather than the Indian expert. The findings and recommendations which appear in this report are founded on that Indian voice. It can only be hoped that this Commission will be seen as a watershed in the long and often tarnished history of this country's treatment of its original people.

What are the explanations for the circumstances in which the Indian finds himself today? First and foremost are the consistently damaging Federal policies of the past—policies which sought through the first three-quarters of the 19th century to remove the Indian people from the midst of the European settlers by isolating them on reservations; and policies which after accomplishing isolation were then directed toward breaking down their social and governmental structures and throwing their land, water, timber and mineral resources open to exploitation by non-Indians. These policies were repudiated by Congress with passage of the Indian Reorganization Act of 1934, but by this time severe damage had been done.

It is the legacy of these policies with which the Indian people attempt to cope today; it is the legacy of these policies which this Commission examines in this report; and it is the legacy of these policies which the people of the United States must resolve over the next years.

One of the greatest obstacles faced by the Indian today in his drive for self-determination and a place in this Nation is the American public's ignorance of the historical relationship of the United States with Indian tribes and the lack of general awareness of the status of the American Indian in our society today. To adequately formulate a future Indian policy it is necessary to understand the policies of the past. For this reason the Commission has included extensive discussions of law and history in order to provide a foundation for understanding matters which affect Indian people.

FOUNDATIONS OF FEDERAL INDIAN LAW

The relationship of the American Indian tribes to the United States is founded on principles of international law. It is a political relation: a relation of a weak people to a strong people; a relation of weak governments to a strong government; a relationship founded on treaties in which the Indian tribes placed themselves under the protection of the United States and the United States assumed the obligation of supplying such protection. It is a relationship recognized in the law of this Nation as that of a domestic, dependent sovereign.

It is a relationship which has sometimes in the past been honored but more frequently violated and at times even terminated. It is a relationship which can and should be nurtured and cherished by this Nation. The fact that the United States has not chosen to disavow this relationship, has not chosen to simply abrogate its treaty commitments, has not chosen to withdraw its recognition of Indians as separate and distinct peoples with cultures, lands and governments of their own—these facts set the United States above other nations in its treatment of its native people, and provide a moral and legal setting from which a forward-looking policy of Federal-Indian relations must progress. No other course will do honor to this Nation; no other course can hold any future for the Indian people.

The fundamental concepts which must guide future policy determinations are:

1. That Indian tribes are sovereign political bodies, having the power to determine their own membership and power to enact laws and enforce them within the boundaries of their reservations, and

2. That the relationship which exists between the tribes and the United States is premised on a special trust that must govern the conduct of the stronger toward the weaker.

The concept of sovereignty and the concept of trust are imperative to the continuation of the Federal-Indian relationship. These form the foundation upon which our entire legal relationship with the Indian tribes stands. These are not new precepts—they are old, dating from the origins of this Nation. It can only be said that if they had been consistently honored in spirit as well as in name, it would not have been necessary to convene this Commission. Without recognition of these fundamental concepts acknowledging Indian rights, the work of this Commission will have been in vain, for without these concepts there is no future Indian policy—only Federal policy.

The Commission recognizes that there is substantial controversy surrounding the concept of tribal sovereignity and the exercise of governmental authority by the tribes within their reservations. The Commission has devoted a significant portion of this report to analysis of judicial decisions relating to the powers of Indian tribes. The trend of these decisions has favored the tribes in their efforts to achieve good government within the reservations. We approve of the judicial decisions which have thus far been rendered. But we caution that the powers exercised by tribes must bear a reasonable relationship to legitimate tribal interests such as protection of trust resources, maintenance of law and order, delivery of services, and protection of tribal government.

This Commission has not proposed any legislative action with regard to the jurisdiction or authority of tribal governments. We have rejected any such effort as being premature and not warranted by any factual evidence. We note that there are some 287 tribal governments within the United States (there are approximately 80,000 State, county and municipal governments) and it is not feasible to attempt to legislatively determine the precise powers of each of these governments in one legislative enactment. We also reject the notion that the jurisdictional reach of Indian tribes within Indian country should be limited to their own membership alone. If such a position were adopted it could truly be said that the tribes were mere social clubs, an assembly of property owners, with no more authority than any civic association. This surely was not the result contemplated by the tribes when they entered into treaties with the United States. Nor is it a result to be desired by anyone today—Indian or non-Indian—when the counsequences are analyzed. For in many areas of Indian country the only workable law enforcement authority present is that of the tribe.

The Commission does not advocate that resolution of jurisdictional conflicts be left solely to the courts. To the contrary, we recommend that State and county governments sit down with the tribal governments and to the extent possible resolve their jurisdictional conflicts to their mutual satisfaction on the basis of mutual respect. To the extent resolution cannot be achieved, then and only then will legislative action by the Congress be appropriate. Clearly there are many areas in which both the States and the tribes have a commonality of interest and the discussion of State and tribal jurisdiction should not be cast in totally adversary terms.

THE TRUST RESPONSIBILITY

The concept of the trust relationship of the United States to the Indian people is one which is not well understood and is the subject of frequent debate regarding both its source and its scope. We have already noted that the trust relationship is one of the two most important concepts underlying Federal-Indian law. This responsibility originates first from the treaties negotiated with Indian tribes in which the United States acquired vast areas of land in exchange for its solemn commitment to protect the people and property of the tribes from encroachment by U.S. citizens. Secondly, from statutory enactment dating from the Continental Congress to the present, regulating transactions between U.S. citizens and Indian people. A third major source of this responsibility arises from a course of dealing in which the United States in the latter half of the 19th century assumed dominion and control over the people and property of Indian tribes, imposing a vast array of regulatory authority over Indians and their property. When the United States assumed this authority over Indian people, it accepted an accompanying responsibility to Indian people.

While the exact parameters of the trust duty are not clearly defined, the Commission has concluded that it would not be desirable to attempt to spell out the duty in terms of statutory specificity. Like doctrines of constitutional law, the trust duty must be considered a constantly evolving doctrine responsive to the changing circumstance of the times. Certain broad concepts have been agreed upon which we believe should guide future policy in relationship to the trust doctrine:

1. The trust responsibility to American Indians extends from the protection and enhancement of Indian trust resources and tribal self-government to the provision of economic and social programs necessary to raise the standard of living and social well being of the Indian people to a level comparable to the non-Indian society.

2. The trust responsibility extends through the tribe to the Indian member, whether on or off the reservation.

3. The trust responsibility applies to all United States agencies and instrumentalities, not just those charged specifically with administration of Indian affairs.

These and other details of the trust obligation are more fully discussed in chapter four of this report. It is recognized that in many areas affected by the trust, particularly social programs, Congress itself will determine the extent of the delivery of services. Chapter four contains numerous specific recommendations relating to the trust, including a requirement for preparation and filing of Indian impact statements by Federal agencies proposing actions which will adversely affect trust resources, and recommendations for a resolution of the conflict of interest which presently pervades legal representation of Indian interests. The principles enumerated above are just that—general principles from which policy considerations must flow.

FEDERAL ADMINISTRATION

One of the most serious impediments to the development of Indian self-sufficiency today lies in Federal administration. Indian tribes, like non-Indian communities, are plagued by an excessive number of Federal agencies offering different programs all of which must be interrelated in order to achieve full community development. Unlike non-Indian governments, however, Indian tribes and people often face difficulties posed by statutory language or administrative rulings that bar their eligibility for participation in programs. There is a continuing tendency on the part of Congress and the Executive to overlook Indian interests in the formulation of new legislation or programs. In recent years there has been substantial improvement in this respect, but it still remains a significant problem.

Most serious is the lack of responsiveness, particularly on the part of the Bureau of Indian Affairs and Indian Health Service, to adhere to the principles of "self-determination" as expressed by Indians and the law. The problem of negative attitudes is compounded by an excessive administrative structure which interferes with the delivery of funds to Indian people. Federal administrators and their excessive field structure compete with Indians for scarce congressional appropriations.

Finally, Indian project initiatives must be encouraged through a program, planning, and budget process which is guided by Indian priorities rather than to satisfy the needs of a self-perpetuating bureaucracy.

It is the conclusion of this Commission that:

1. The executive branch should propose a plan for a consolidated Indian Department or independent agency. Indian pro-

grams should be transferred to this new consolidated agency where appropriate.

2. Bureaucratic processes must be revised to develop an Indian budget system operating from a "zero" base, consistent with long-range Indian priorities and needs. Those budget requests by tribes should be submitted without interference to Congress.

3. Federal laws providing for delivery of domestic assistance to State and local government must be revised to include Indian tribes as eligible recipients.

4. To the maximum extent possible, appropriations should be delivered directly to Indian tribes and organizations through grants and contracts; the first obligation being to trust requirements.

ECONOMIC SELF-SUFFICIENCY

Indian lands encompassed approximately 50 million acres located on over 200 reservations in some 26 States. A 1975 General Accounting Office report on Indian natural resources estimated that Indian lands include: 5.3 million acres of commercial forest land, including about 38 billion board feet of timber; 44 million acres of rangeland; and 2.5 million acres of cropland. Indians have superior claims to water to develop their lands, and they have valuable rights to share in the harvest of fish in the Pacific Northwest.

Deposits of oil and gas, coal, uranium and phosphate are found on some 40 reservations in 17 States. Production of coal on Indian lands in 1974 was 35.8 percent of the combined production on Federal and Indian lands (1.9 percent of the Nation's total); excluding offshore oil production, Indian lands produced 13.6 percent of the total production value of oil and gas on all Federal and Indian lands (4.4 percent of the Nation's total); phosphate production on Indian land was 35.4 percent of production on Federal and Indian land (4.9 percent of the Nation's total); and Indian lands produced fully 100 percent of the uranium value produced on all Federal and Indian lands.

And yet, for the most part, Indian reservations remain underdeveloped and Indian people lack credit, remain poor, uneducated and unhealthy. From the standpoint of personal well-being the Indian of America ranks at the bottom of virtually every social statistical indicator. On the average he has the highest infant mortality rate, the lowest longevity rate, the lowest level of educational attainment, the lowest per capita income and the poorest housing and transportation in the land.

How is this disparity between potential wealth and actual poverty to be explained? At least one explanation lies in the fact that a very significant part of this natural abundance is not controlled by Indians at all. Fractionated land ownership engendered by Federal laws impedes efficient development projects in timbering, farming, and ranching. Significant quantities of Indian natural resources are leased out to non-Indian enterprises at rates significantly less than that derived by non-Indians for comparable lands. Access to development credit is often difficult to obtain, and tribes often lack the technical skills necessary to undertake development of their own resources. Roads, communications systems and other elements of economic infrastructure are frequently insufficient to support development efforts.

Indian opinion is virtually unanimous in the desire for economic self-sufficiency. Certainly not all tribes will be able to fully attain this goal, but with proper support from the Federal Government, many can. Clearly it lies within the best interests of the Indian tribes and the United States to give full support to the development of economic enterprises by the tribes.

1. The first order of business of future Indian policy must be the development of a viable economic base for the Indian communities.
2. Adequate credit systems must be established for Indian economic development projects; funds must be established to provide for land acquisition and consolidation; and policies must be adopted which will favor Indian control over leases of their own natural resources.
3. Technical assistance must be available to tribes both in the planning and management stages of operations.
4. Every effort must be made to encourage and aid tribes in the development of economic projects relevant to their natural resource base.

RESTORATION AND RECOGNITION

Despite recent policies which have encouraged self-determination and which have reaffirmed the permanent nature of tribal governments, there are many tribes which suffer because of past policies which failed to recognize their status, or sought to end it. Almost 100 tribes' relationship to the Federal Government was legislatively ended during the 1950's when Congress adopted a policy called "termination." One hundred thirty other tribes [1] have never been recognized by the Federal Government usually because of bureaucratic oversight, and they too suffer because their status is not defined. There is no reason why some 200 tribes should not benefit from the relationship the United States maintains with other tribes, and there is no reason why Federal policy should not be implemented equitably to all tribes.

1. Tribes which were terminated must be restored to their formal political status and Congress must establish a legal process for restoration.
2. Tribes which have been overlooked, forgotten, or ignored must be recognized as possessing their full rights as tribes.

URBAN INDIANS

Through policies of "relocation" the United States sought to remove Indians from the reservation environment to cities where they would assimilate with non-Indian people. These policies were poorly administered and unsuccessful in attaining their goal. The United States bears some liability for the effect of these policies on Indian people, yet today Indian people who live in cities find it extremely difficult to avail themselves of the minimal federal services they would readily receive on reservations. Aside from this question of responsibility for past policies, the United States should also recognize that Indian people in urban areas have special needs which Government programs could help to alleviate. Unfortunately, Federal-Indian programs frequently ignore off-reservation Indians, and the structures which urban Indians have established themselves and which could aid in the administration of Federal programs.

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[1] "Tribes" as it is used here, includes bands and other Indian groups, and is more clearly defined on pp. 461–462.

1. Federal Indian programs should address the needs of off-reservation Indians.
2. Programs directed to the needs of urban Indians should encourage and utilize urban Indian service centers.

These elements make up the major thrust of this Commission's report. They are, in large measure, the direct result of 11 task forces which were assigned by Congress to investigate major areas of contemporary importance to Indian people. Task force studies were mandated in the following areas:

1. Trust Responsibilities and the Federal-Indian Relationship
2. Tribal Government
3. Federal Administration and the Structure of Indian Affairs
4. Federal, State, and Tribal Jurisdiction
5. Indian Education
6. Indian Health
7. Reservation and Resource Development and Protection
8. Urban and Rural Non-reservation Indians
9. Indian Law Consolidation, Revision and Codification
10. Terminated and Non-Federally Recognized Indians
11. Alcohol and Drug Abuse

These areas reflect Congress's initial understanding that Indian Affairs were plagued by the following problems, that: (1) the trust relationship and treaty rights were poorly defined and confusing concepts basic to Indian law; (2) tribal governments held a poorly defined and seldom-understood status in the Federal system; (3) Indian people were perplexed and impeded by a massive bureaucracy whose function and merit were perpetually questioned by Indians and non-Indians alike; (4) Indians and non-Indians on reservations were enmeshed in jurisdictional disputes with municipal, county, State, and Federal powers; (5) education of Indians was questionably administered and had disappointing results; (6) Indian health was substandard; (7) reservations were underdeveloped and economic planning was insufficient for development; (8) off-reservation Indians were alienated and disenfranchised; (9) Federal-Indian laws were complex and often absolute, and never received the scrutiny necessary for proper revision; (10) a number of tribes were unreasonably excluded from the Federal-Indian relationship; (11) alcoholism and drug abuse were afflictions which caused especially severe problems for the Indian population. Additionally, two special task force reports were prepared on the Management Study of the Bureau of Indian Affairs and on Alaskan Native Issues.

The Commission has utilized the work of these task forces in preparing this final report. Not all of the findings and recommendations of the task forces have gained expression here, but this broad statement of Indian policy falls generally into the context of the task force conclusions.

A summary of the specific recommendations of this Commission follows in the next chapter.

SUMMARY OF RECOMMENDATIONS

Two hundred six specific recommendations are set forth below and numbered consecutively beginning with chapter one and concluding in chapter thirteen.

CHAPTER ONE.—CAPTIVES WITHIN A FREE SOCIETY

No recommendations.

CHAPTER TWO.—CONTEMPORARY CONDITIONS

The Commission recommends that:

1. Congress require the Assistant Secretary of Indian Affairs to provide a comprehensive annual report on Indian matters which will contain reliable, current, and accurate data.

The Secretary of Interior be directed to gather and maintain material for this report from all Government agencies serving Indians.

The report be organized to present facts relating to Indian treaties, agreements, and Executive orders; current land, population, tribal government, economic, health, welfare, education, and housing statistics in Indian communities; material relating to the use of natural resources on Indian land; and information on administration of all Indian programs. A sample format for this proposed report can be found in appendix C.

CHAPTER THREE.—DISTINCTIVE DOCTRINES OF AMERICAN INDIAN LAW

No recommendations.

CHAPTER FOUR.—TRUST RESPONSIBILITY

The Commission recommends that:

2. Congress reaffirm and direct all executive agencies to administer the trust responsibility consistent with the following principles and procedures. The rationale for each proposal follows the Commission's statements. In carrying out its trust obligations to American Indians (including Alaskan Natives), it shall be the policy of the United States to recognize and act consistent with these principles of law:

The trust responsibility to American Indians is an established legal obligation which requires the United States to protect and enhance Indian trust resources and tribal self-government and to provide economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.

In matters involving trust resources, the United States be held to the highest standards of care and good faith consistent with the prin-

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ciples of common law trust. Legal and equitable remedies be available in Federal courts for breach of standards.

Although the trust responsibility is a legally binding duty required of all United States agencies and instrumentalities, and although Congress has the ultimate responsibility for insuring that the duty is met, there be in the executive branch one independent prime agent charged with the principal responsibility for faithfully administering the trust.

The trust responsibility extends through the tribe to the Indian member, whether on or off the reservation. His or her rights pursuant to this United States obligation are not affected by services which he/she may be eligible to receive on the same basis as other United States citizens or which the tribe may be eligible to receive on the same basis as any other governmental unit.

The United States holds legal title to Indian trust property, but full equitable title rests with the Indian owners.

3. Before any agency takes action which may abrogate or in any way infringe any Indian treaty rights, or nontreaty rights protected by the trust responsibility, it prepare and submit to the appropriate committee in both Houses of Congress an Indian trust rights impact statement, to include, but not be limited to, the following information:

Nature of the proposed action.

Nature of the Indian rights which may be abrogated or in any way infringed by the proposed action.

Whether consent of the affected Indians has been sought and obtained. If such consent has not been obtained, then an explanation be given of the extraordinary circumstances where a compelling national interest requires such action without Indian consent.

If the proposed action involves taking or otherwise infringing Indian trust lands, there must be notification whether or not lieu lands have been offered to the affected Indian or Indians.

4. When considering legislation which may have an adverse impact upon treaty or nontreaty rights of Indians, the Congress adhere to the following principles.

The United States not abrogate or in any way infringe any treaty rights, or nontreaty rights that are protected by the trust responsibility, without first seeking to obtain the consent of the affected Indian or Indians. Such rights not be abrogated or infringed without such consent except under extraordinary circumstances where a compelling national interest requires otherwise. With or without Indian consent, such rights not be abrogated or infringed in any way except pursuant to a congressional act which identifies the specific affected Indian rights and which states that it is the intent of Congress to abrogate or infringe such rights.

5. To diminish the conflict of interest prevalent when the Department of Justice and the Department of the Interior provide legal services to Indians, to provide for more efficient rendering of legal services to Indians, and to otherwise improve the representation which Indians receive for protection and enforcement of their trust rights, Congress enact the following legislation:

There be established within a newly created Department of Indian Affairs (see recommendations in chapter VI) an Office of Trust Rights

Protection. Its duties shall include, but not be limited to, cataloging and assisting in the management of Indian trust property, advising Indians and Indian tribes in legal matters and representing them in all litigation and administrative proceedings involving Indian trust rights. In appropriate field offices of the Department of Indian Affairs, there be a legal and professional staff under the supervision of the Office of Trust Rights Protection.

The Office of Trust Rights Protection be authorized to render all appropriate legal services which now are rendered by the Department of Justice and the Department of the Interior, provided that the Indian client agrees to accept representation and services.

The Office of Trust Rights Protection have the primary responsibility of the Federal Government for protecting, enforcing, and enhancing Indian trust rights, but this shall not relieve any Federal agency from the duty to recognize and act consistent with the Federal trust responsibility for Indians.

The Office of Trust Rights Protection act in the name of the United States as trustee for Indians in all legal matters and proceedings, except those which it refers to the Department of Justice for litigation. It have the discretion to so refer those matters for which it does not have the staff, resources or expertise to handle. The Office also have the discretion and authority to engage private legal counsel to represent Indians, tribes or groups in trust matters. In such cases, the United States Government may pay all fees and costs and the wishes of the Indian clients shall be complied with, as much as possible, in the selection of counsel. Where there is conflict of interest between an individual Indian and a tribe involving trust issues, the Office represent the tribe and have the discretion to engage private counsel to represent the individual at Government expense.

The United States waive sovereign immunity for all actions involving Indian trust matters brought by the Office of Trust Rights Protection or private counsel engaged by it to represent Indians.

The Office be authorized to obtain whatever information, services, and other assistance deemed necessary from other Federal agencies, and such agencies be obligated to comply with such requests.

6. Federal courts be authorized to award attorneys' fees and expenses and all reasonable costs incident to litigation, including but not limited to, expert witness fees, in cases in which an Indian or Indian tribe or group engages private attorneys and is successful in protecting or enforcing treaty, trust, or other rights protected by Federal statute. Federal courts be given the discretion to order that all such fees and costs be paid by the losing party or by the United States Government.

CHAPTER FIVE.—TRIBAL GOVERNMENT

The Commission recommends that:

7. The long term objective of Federal-Indian policy be the development of tribal governments into fully operational governments exercising the same powers and shouldering the same responsibilities as other local governments. This objective should be pursued in a flexible manner which will respect and accommodate the unique cultural and social attributes of the individual Indian tribes.

8. No legislative action be undertaken by Congress in relation to tribal jurisdiction over non-Indians at this time.

9. Congress appropriate significant additional moneys for the maintenance and development of tribal judicial systems:

Funding be direct to tribes.

Funding be specifically provided to enable tribal courts to become courts of record.

10. Congress provide for the development of tribal appellate court systems.

Appellate court systems will vary from tribe to tribe and region to region.

The development of tribal court systems will require tribal experimentation and time.

Congress statutorily recognize such appellate systems as court systems separate from State and Federal systems.

When tribal court systems are firmly operative, Federal court review of their decisions be limited exclusively to writs of habeas corpus.

11. Congress provide by appropriate legislation that lands held in trust for an Indian tribe and assigned to an individual Indian be exempt from Federal taxation and that the income from such lands also be exempt, in the same way that restricted and allotted lands are presently exempt.

12. Congress provide by appropriate legislation that the benefits received from those programs designed to aid in the economic development of Indians shall not be subject to Federal taxation.

13. Congress amend the Internal Revenue Code to provide that provisions of the Code which apply to non-Indian governments are to be applied in a like manner and to the same extent to Indian tribal governments. This would include the same benefits enjoyed by individuals in their relations to tribal governments.

14. Congress amend or repeal, as appropriate, those statutes which authorize State taxation which are in conflict with Federal-Indian policy to foster economic development of reservation Indians and enhance tribal self-government. Specifically, State taxation of mineral production on leased Indian lands be repealed or amended.

15. Congress provide by appropriate legislation that State taxation within reservations be invalidated as applied to non-Indians when the burden of such taxation falls directly or indirectly upon the Indian.

16. Congress enact legislation which provides that where an Indian tribal government enacts a tax in furtherance of Federal-Indian policy, designed to enhance the tribes' self-governing capacity or to protect or foster tribal economic development of Indian people or the tribe, such tax will have the effect of preempting any competing State tax which would be applicable to the same person or activity.

17. The Department of the Interior aid Indian tribes in the development of comprehensive management plans for fish and wildlife resources. Indian people must be involved in the management of their own trust resources.

18. The executive branch undertake action to stimulate the tribes and States to enter into cooperative agreements in the management, allocation, and enforcement of off-reservation fishing activities by both Indians and non-Indians. Such cooperative agreements must

recognize the rights of the Indians in the fish resource and their responsibility in the management and allocation of that resource.

19. Congress appropriate funds necessary to aid individual tribes and intertribal organizations in the development and management of fishery programs.

20. Congress enact legislation authorizing the Department of the Interior (Parks and Wildlife Division) with standby authority to allocate fish resources and enforce such allocations as to Indians or non-Indians or both, whenever the States or the tribes fail to regulate those persons under their respective jurisdiction.

21. Section 18 of the Indian Reorganization Act (25 U.S.C. § 478), which provides that no part of that Act shall apply to any reservation wherein a majority of the adult Indians vote against its application, be repealed. In its place, Congress enact a savings clause to provide that the rights of any tribe which has organized under the terms of section 16 of the Act or formed a corporation under section 17 of the Act will not be adversely affected.

To accomplish this result, the Commission recommends the following specific legislative actions:

> Repeal section 18 of the IRA which reads as follows:
>
> > This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days notice.
>
> Insert in place of this section the following language:
>
> > The rights of any Indian tribe which has chosen to organize under sections 16 and 17 of the Indian Reorganization Act shall not be affected by this repeal.

22. Section 16 of the Indian Reorganization Act (25 U.S.C. § 476) which authorizes tribes to organize under the provisions of that Act be amended:

(1) to specifically reflect the fact that tribes have an inherent right to form their own political organizations in the form which they desire; and (2) to provide that notwithstanding any provisions in existing tribal constitutions which vest the Secretary with authority to review and disapprove ordinances enacted by the tribal government shall only extend to those matters directly related to the trust responsibility over the use and disposition of trust assets. However, those tribes who wish to retain such authority on an interim basis shall be authorized to do so.

To accomplish this result, the Commission recommends amendment of section 16 of the IRA along the following lines:

> The right to choose their natural form of government is the inherent right of any Indian tribe. Amendments to tribal constitutions and by-laws adopted pursuant to the Indian Reorganization Act shall be ratified and approved by the Secretary to protect the trust assets and resources of the tribes.
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, said Indian tribe shall also be recognized to have the following rights and powers: To employ legal counsel,

to prevent the sale, disposition, lease or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe; and negotiate with the Federal, State and local governments. The Secretary of the Interior shall advise all Indian tribes and/or their tribal councils of all appropriation estimates of Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

Notwithstanding the provisions of any existing tribal constitution or similar document which vests authority in the Secretary to review and approve or disapprove proposed actions of said Indian tribes, the Secretary's authority over Indian tribes will only extend or be directly related to the trust responsibility over the use and disposition of trust assets. However, any Indian tribe which may desire a continuation of their presently existing delegation of authority to the Secretary is hereby authorized to do so.

23. Section 2 of title 25 U.S.C., be amended to provide that the authority of the Secretary of the Interior over tribes shall only extend to actions relating to protection of tribal trust assets. Within these limits, whenever the Secretary finds it necessary to disapprove a proposed tribal initiative, he must file a written statement with the tribe notifying them of the reason for his disapproval of their proposed action and afford them an opportunity for a hearing.

24. Section 81 of title 25 U.S.C., be amended to accomplish a result similar to that proposed above, i.e., that whenever the Secretary disapproves any proposed contract dealing with trust assets, he provide the affected tribe or person with a written statement of his reasons for disapproval and provide them with an opportunity for a hearing.

To accomplish these results, the Commission recommends amendatory language along the following lines:

> That 25 U.S.C. § 2 be amended to include the following language:
>
> > The authority of the Secretary of Interior over Indian tribes shall only extend to these actions deemed necessary to protect tribal trust assets and resources. In any action which the Secretary finds it necessary to disapprove a proposed tribal government initiative, the Secretary shall take such action within 60 days of having been officially notified of the proposed tribal action by the Indian tribal government and any disapproval of the proposed tribal action shall be accompanied by an opportunity for a hearing on the part of the tribe, and the Secretary's decision shall be based on written findings of fact which shall specify the reasons for his disapproval.

That 25 U.S.C. § 81 be amended in the following manner: The third paragraph beginning "second * * *" shall read:

> It shall bear the approval of the Secretary of the Interior and Commissioner of Indian Affairs endorsed upon it. The Secretary of the Interior and the Commissioner of Indian Affairs shall disapprove any such proposed contract only after finding that the proposed contract shall endanger the trust assets or resources of the tribe or individual Indian. Such findings shall be submitted to the proposed tribe and/or Indian in written form specifying the exact reason for disapproval.

25. Additional legislation be enacted to authorize tribes to override Secretarial disapproval of their proposed use of trust assets. Such an override must be coupled with a waiver of liability on the part of the United States to the limited extent that the override may result in loss.

Legislation be enacted establishing that if the Secretary disapproves a tribal government initiative, contract, or other tribal action involving the use or disposition of a trust asset, the tribe shall be entitled to override such Secretarial disapproval using the following procedures:

a. The Secretary shall supply the tribe with a detailed statement of the reasons for his disapproval of their proposed use or disposition of the trust asset, specifically setting forth the loss he believes may result from such tribal proposal.

b. After due consultation between the representatives of the tribe and the Secretary or his representative, the tribal council may, by formal resolution, elect to override the disapproval of the Secretary. Such resolution must contain a specific waiver of liability on the part of the United States for losses which may result as a direct result of the tribal override.

c. In the consultation process, the Secretary shall be held to the highest standards of care and good faith consistent with the principles of common law trust in advising the tribes of the potential consequences of the proposed tribal decision.

d. A tribal override of a Secretarial disapproval shall not diminish the trust character of the asset in question. The trust responsibility of the United States to aid the tribe in the implementation of their decision and to protect the future well-being of the asset shall continue undiminished.

e. In any case in which the Secretary has reasonable cause to believe that the decision of the tribal government may not reflect the will of the majority of the members of a tribe he shall (may) require a referendum of the tribal members, the expense of which shall be borne by the United States and not the tribe.

f. In the event the Secretary determines that a tribal resolution should be put to a referendum, he must notify the tribal council within thirty (30) days of the passage of their resolution, and he must call for such referendum vote not more than forty-five (45) days after tendering such notification.

26. The Department of Justice issue regulations or orders directing U.S. attorneys to accept criminal referrals from qualified tribal and/or BIA police or investigators.

Congress hold oversight hearings to see that this recommendation is accomplished or receive an explanation why it should not be done.

27. Congress hold oversight hearings with representatives of the Department of Justice, BIA, and tribal authorities, particularly police and judges to inquire into the jurisdiction relationship of the tribal and Federal courts and ascertain what legislation, if any, is needed as a consequence of this decision.

28. Congress hold oversight hearings with representatives of the Department of Justice and Interior and with Indian tribal authorities to ascertain the scope of this problem.

29. Corrective legislation, if any is needed, must be premised on the continued protection of tribal self-government. The scope of the appli-

cation of the Assimilative Crimes Act must be strictly limited. It must be recognized and accepted that the laws of the tribes will not always conform to the laws of States in which their reservation lies. This is the meaning of self-government.

30. Legislation be passed providing for retrocession adhering to the following principles:

Retrocession be at tribal option with a plan.

A flexible period of time for partial or total assumption of jurisdiction, either immediate or long term, be provided.

There be a significant preparation period available for those tribes desiring such, with a firm commitment of financial resources for planning and transition.

There be direct financial assistance to tribes or tribally designated organizations.

LEAA be amended to provide for funding prior to retrocession for planning preparation, or concurrent jurisdiction operations.

Provisions be made for Federal, corporate, or charter status for intertribal organizations (permissive, not mandatory).

There be tribal consultation with State and county governments concerning transition activities (no veto role, however).

The Secretary of the Interior:

(a) Act within 60 days on a plan or it is automatically accepted;

(b) Base nonacceptance only on an inadequate plan;

(c) Delineate specific reasons for any nonacceptance;

(d) Within sixty (60) days after passage of the Act, the Secretary of the Interior draft detailed standards for determining the adequacy or inadequacy of a tribal plan. Such standards be submitted to Congress who shall have sixty (60) days to approve or disapprove such standards.

Any nonacceptance of retrocession by the Secretary of the Interior be directly appealable to a three-judge district court in the District of Columbia; and

The Department of the Interior be obligated to pay all reasonable attorney fees as determined by the Federal court, except where such appeal is deemed by the court to be frivolous.

Once partial or complete retrocession is accomplished, the Federal Government be under a mandatory obligation to defend tribal jurisdiction assertions whenever any reasonable argument can be made in support of them.

31. Title II of the 1968 Indian Civil Rights Act be amended so that it is crystal clear that this Act was not intended as a general waiver of sovereign immunity of the tribes. The holding in *Loncassion* v. *Leekity*, 334 F. Supp. 370 (D., N.M., 1971) authorizing a money judgment against the tribes be specifically rejected by Congress. While the courts must have authority to enforce substantive aspects of the Act (as limited by the recommendation above), Indian tribes like any other governments, must have sovereign immunity and some protection for their officers if they are to be able to govern fairly. Equitable actions such as mandamus against tribal officials may be permissible, but they should be immune from money judgment when they work within their scope of duty. In this respect, they should

be in the same position as State and Federal officials; i.e., protected when acting within the scope of duty but personally liable when acting beyond or outside their defined scope of duty.

32. The jurisdictional provisions of the 1968 Indian Civil Rights Act be reexamined. Habeas corpus review is the only jurisdictional provision now included in this Act, yet the courts have assumed jurisdiction over a broad range of actions which do not involve detention. As the situation stands, the jurisdictional reach of Federal courts and the remedial orders which they feel free to enter is virtually unlimited. This is in complete contrast to all other Federal civil rights legislation.

33. The part of the 1968 Indian Civil Rights Act providing for a right to trial by jury be amended to specify that the right guaranteed by this subsection only be applicable to offenses which if charged in a Federal court would be subject to a right to trial by jury. As section 202(10) presently reads the rights to trial by jury would theoretically apply to almost every offense a person might be charged with, no matter how slight the penalty.

34. The provisions of the 1968 Indian Civil Rights Act limiting the penal authority of a tribe to fines of $500 or six (6) months imprisonment, or both, should be amended to increase these figures to fines of $1,000 or one (1) year imprisonment, or both.

35. Section 1738 of title 28 U.S.C. be amended to specifically include Indian tribes among those governments to whom full faith and credit be given. The purpose of this amendment would be to clarify and reinforce the rulings of the majority of courts to the effect that Indian tribes are on the same footing as States and territories with respect to the application of full faith and credit principles.

36. Congress amend title II of the 1968 Indian Civil Rights Act to provide a mechanism for limited appeals to United States district courts after exhaustion of all available tribal remedies. The need for such a provision is directly related to: (1) the Commission recommendation for according full faith and credit to tribal laws and court judgments; and (2) to the expanding role of tribes in civil and criminal matters involving non-Indians. This legislation should adhere to the following principles:

> Existing Federal law permits Federal courts to review the judgments of State courts for matters involving questions arising under the U.S. Constitution or Federal statutes.
>
> The limited right of appeal proposed in this part would authorize Federal court review of tribal court decisions in both civil and criminal matters in extraordinary circumstances involving a prima facie showing of a denial of due process (fundamental fairness) or denial of equal protection, and/or when the amount in controversy exceeds a specified amount ($10,000).
>
> Section 203 of title II of the Civil Rights Act (25 U.S.C. § 1303) which extends the privilege of the writ of habeas corpus to test the legality of detentions by order of Indian tribes be amended to provide a limited right of appeal from final orders or judgments of the highest court system of the respective tribe in both civil and criminal matters.

Appeal to the Federal court not be allowed until the petitioner has exhausted all available tribal remedies. This "exhaustion" requirement include all tribal appellate remedies including appeals to regional intertribal courts of appeal should the tribes elect to enter into such intertribal compacts. The requirement for exhaustion be rigidly enforced by the courts.

The review not turn on procedural requirements but rather be premised on fundamental fairness based on the entire record. This amendment follow the rule laid down in cases that this Act did not "blanket in" the entire body of Federal case law but provides for interpretation in a manner consistent with the needs and customs of tribal institutions.

37. Congress enact legislation guaranteeing the permanency of tribal governments within the Federal domestic assistance program delivery system.

38. Congress enact legislation to resolve the inconsistencies of Federal domestic assistance legislative and administrative procedures as they define the status of tribal governments within the Federal domestic assistance program delivery system. The implementation of principles which would resolve such inconsistencies establish a clear definition of tribal government eligibility for each Federal domestic assistance program and guarantee the jurisdictional independence of tribal governments as permanent political entities within the Federal domestic assistance program delivery system.

39. Congress authorize the waiver of administrative regulations of Federal domestic assistance programs which condition eligibility on population formulas. Allocation of funds, however, should employ some population criteria such as that utilized by BIA under P.L. 93-638 to provide adequate funding to tribes with smaller population bases.

40. Congress establish Federal policy recognizing the sovereign right of a tribal government to form its own government. In accordance with Federal policy, eligibility criteria of Federal domestic assistance programs not force tribal governments to form consortiums or intertribal affiliations in order to become eligible for Federal domestic assistance.

41. Congress amend the Intergovernmental Cooperation Act of 1968 (40 U.S.C. § 535 and 42 U.S.C. § 1401) to include tribal governments in the scope of intergovernmental activities and access to Federal program information provided for under the Act.

42. Congress amend the Law Enforcement Assistance Act (42 U.S.C. § 3711, et seq.) to remove State jurisdiction over tribal governments in the service delivery system of Law Enforcement Assistance Administration programs, thereby allowing programs and moneys to flow directly to the tribal government.

43. Congressional recognition of the legal status of tribal governments include the recognition that tribal governments must have the financial resources necessary to support the basic operations of tribal government, so that tribes may effectively exercise their inherent sovereign powers.

44. Congress direct the Bureau of Indian Affairs to undertake a needs assessment of each tribal government to determine tribal capability to finance the basic operations of tribal government.

45. Congress authorize the evaluation of the administrative regulations of self-determination grants program, and require the revision of regulations where such regulations narrow the scope of congressional intent articulated in the Indian Self-Determination and Education Assistance Act.

46. Congress assure that in both administrative and judicial proceedings, Indians will be assured competent, independent counsel.

CHAPTER SIX.—FEDERAL ADMINISTRATION

The Commission recommends that:

47. Congress enact affirmative legislation to reaffirm and guarantee the permanence and viability of tribal governments within the Federal system.

48. Congress clarify the eligibility of tribal governments as prime sponsors for Federal domestic assistance programs and other programs delegated to State and local governments.

49. Congress enact legislation establishing tribal governments as equal to State governments in Federal domestic assistance programs. This includes amendment of all enabling legislation, program acts, and administrative regulations which require tribal governments to come under State jurisdiction.

50. Congress amend the Intergovernmental Cooperation Act to include tribal governments, and enact the Federal Program Information Act (S. 3281) to include Indian tribes.

51. Congress appropriate such funds as are necessary to allow the preparation of operations and procedure manuals to be used by tribal governments in their administration of tribal government affairs. These manuals would include operation models presenting alternative systems of financial management, accounting, personnel policies and procedures, management information and organization structure.

52. Congress enact Senate Bill S. 2175—Public Participation in Government Proceedings Act of 1976.

53. The executive branch establish an Indian Career Service consistent with statutory provisions and be charged with the responsibility of developing the employment standards as required by section 12 of the Indian Reorganization Act of 1934.[1]

54. The executive branch propose a plan to implement the provisions of section 12 of the Indian Reorganization Act of 1934 by establishing standards for the hiring of Indians apart from the requirements of civil service laws in the Bureau of Indian Affairs and the Indian Health Service.

55. Congress amend section 12 of the Indian Reorganization Act of 1934 to make the Indian preference applicable to all Federal agencies administering programs specifically directed to Indian affairs.

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[1] A complete legal analysis with findings related to Indian preference laws is contained in the Task Force No. 9 final report, vol. I, pp. 106–120.

56. The executive branch coordinate efforts to provide for the direct administration of contract funds by the Indian people.

57. The executive branch direct the implementation of section 7(b)[2] of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450e(b) supp. 1976) to direct its applicability to all Federal agencies; further to direct the General Services Administration to amend Federal procurement regulations to:

Clarify the scope and intent of section 7(b).

Emphasize that a contradicting order cannot modify a congressional Act.

Clarify that title VII, section 703(i) of the 1964 Civil Rights Act provides for permissible preferences.

Provide standard Indian preference language be included.

58. The executive branch direct that the Office of Federal Contract Compliance within OMB offer a statement in support of the amended Federal procurement regulations.

59. The Bureau of Indian Affairs compile and maintain a permanent list of qualified Indian contractors; such a list to be maintained; standards being maintained; such lists to be available to all Federal agencies.

60. The executive branch coordinate and consolidate all technical assistance efforts into a single agency.

61. The executive branch establish a national professional and technical Indian skills bank administered by Indians.

62. The executive branch direct and coordinate all agencies to establish a model National Indian Technical Assistance Center—consolidating personnel with technical assistance grants and contracts. Such consolidation to run parallel to existing BIA service units to test the feasibility of an independent agency service center.

63. The President submit to Congress a reorganization plan creating a Department of Indian Affairs or independent agency to be comprised of appropriate functions now mainly administered by the Bureau of Indian Affairs, Indian Health Service, and agencies within the Interior and Justice Departments. Rights protection be consolidated as set forth in chapter four of this report.[3]

64. The plan for a transfer of appropriate programs and functions to the new agency include a review of those programs identified in this chapter. In the interim, the President establish a temporary special action office within the White House which would be charged with responsibility for preparing a plan for the President.

65. The President designate the Secretary of the Interior and the Secretary of Health, Education, and Welfare to implement and coordinate efforts to evaluate and plan the transfer of various agencies in the event of the establishment of a department or of an independent agency.

66. Congress authorize a management study of the Indian Health Service to be conducted utilizing experts from the public and private sector and representatives from the Indian community.

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[2] A legal analysis of the mandates of Indian contracting under 7(b) is contained in the final report of Task Force No. 9 in vol. I, pp. 221–230.

[3] The authority of the President to reorganize the executive branch (*see* Chapter IX, Title 5, U.S.C.) does not include the creation of a new cabinet or executive department, the President needs to submit to Congress a reorganization plan.

67. The President submit to Congress an appropriate plan for the removal of all Indian education programs from the Office of Education, in the Department of Health, Education, and Welfare and the Bureau of Indian Affairs, to a consolidated independent Indian agency. Such Executive action would establish:

Stronger lines of communication between tribes and the source of educational funding;

An administrative structure that would support the development of tribal control;

Direct targeting of moneys and services to tribal communities;

A reliable data base, such that effectiveness of fund utilization can be monitored;

Programs that permit individualization of services to meet the unique needs of each project; and

Direct rather than coincidental aid for educational problems.

68. The Secretary of the Interior implement an action plan for the modernization of the Bureau of Indian Affairs in order to change it from a management to a service agency. Such a plan give maximum consideration to the Commission's "BIA Management Study" proposals. Generally, these are:

A new organizational structure be established to trasfer authority and responsibility to the local level. Particularly, the present area offices be divested of their line authority and be established as service centers.

The establishment of a planning and budget system which will stimulate Indian tribal participation and place more emphasis on tribal project priorities in the congressional appropriation process. Tribes should participate in the budget process directly with the Commissioner or Assistant Secretary of Indian Affairs and Congress to the greatest degree possible.

The establishment of a program to improve the communications and management information system throughout the BIA and contract for access to an automatic data processing system which will also be made available to tribal computer terminals.

The reorganization of the personnel system to improve BIA effectiveness while continuing to train, hire, and upgrade Indians.

69. The executive branch direct the Secretary of the Interior to compile an appropriate manual of operations which will define and publish minimum and standard threshold trust protection in management, procedures, accounting, monitoring, evaluation, and reporting which should be provided as a standard for all Departments and their field offices as well as for Indian tribes.

70. The Secretary of Interior, under existing authority, undertake the amendment of the rules of procedure of the Department of Interior (42 CFR, subtitle (a), 1975) pursuant to sec. 4(d) of the Administrative Procedures Act (5 U.S.C. § 553(e) and 43 CFR § 14.1) to provide compensation for certain participants in the rulemaking and adjudicatory proceedings conducted by the Department of Interior, including public informal hearings conducted in rulemaking procedures.

71. The Secretary of the Interior direct that the Commissioner of Indian Affairs be given Assistant Secretary status. This can be accomplished administratively, but may require other supporting legislation.

72. The Secretary of the Interior remove the Associate Solicitor's Office of Indian Affairs from the Interior Solicitor's Office and create an Office of the General Counsel in the Bureau of Indian Affairs.

73. The Secretary of the Interior establish a separate Office of Indian Program Development and Budget, as well as a separate Office of Policy Analysis for Indian Affairs under the Assistant Secretary, Program Development and Budget.

74. The Deputy Under Secretary for Indian Affairs become an integral part of an implementation team and direct Secretarial inhouse administrative action.

75. The Secretary of the Interior direct the Bureau of Indian Affairs to establish a duly elected board of regents to be recognized as a unit representing tribes and tribal opinion to contract for and administer postsecondary schools.

76. The Secretary of the Interior direct the Bureau of Indian Affairs to establish that a duly elected Board of Regents representing each tribe be recognized as a unit representing tribes and tribal opinions to contract for and administer those multitribal elementary and secondary schools.

77. Congress establish permanent standing or special select committees for Indian affairs in each House or place all jurisdiction, oversight, and legislative authority in one joint select committee.

CHAPTER SEVEN.—ECONOMIC DEVELOPMENT

The Commission recommends that:

78. Congress appropriate funds and provide technical assistance to insure the preservation, consolidation, and acquisition of Indian lands upon which to build tribal future. This includes assisting tribes in devising comprehensive land consolidation plans, and assisting landless tribes in establishing a land base. Congress, therefore, provide legislation which would:

(1) Increase the funds in the Revolving Loan Fund (Indian Financing Act) administered by the Bureau of Indian Affairs, and create a setaside specifically for tribal land acquisition. These loans should carry lower interest rates and longer terms than now exist for other enterprises receiving loans under the Fund. Present requirements should remain which stipulate that there be a reasonable prospect of repayment and that the applicants must have exhausted other avenues of reasonable financing, but there should be less rigid requirements relating to the profitability of the land.

(2) Mandate that the Revolving Loan Fund have standby line of credit for tribes to use when immediate access to funds is necessary to purchase key tracts of land which are for sale and are essential to the tribe's acquisition or consolidation plans but would probably otherwise be lost to the tribe during the loan application process.

(3) Permit tribes to have a "first right of purchase" option when individually held trust land or non-Indian land within a reservation is offered for sale.

(4) Amend section 5 of the Indian Reorganization Act to provide for an increased appropriation of funds for land acquisition, particularly for those tribes which are presently landless.

(5) Amend sections 1465 and 1495 of title 25 of the U.S. Code to delete the provisions of Indian Financing Act funds which restricts the use of purchase of lands outside the exterior boundaries of Indian country unless the purchaser was the owner of trust or restricted interests in the land prior to purchase.

(6) Amend the "excess property" provisions of the Federal Property and Administrative Services Act, 40 U.S.C. § 471, *et seq.*, to specifically provide for transfers of excess property, whether located within or without the exterior boundaries of tribal lands, to the Bureau of Indian Affairs for use by Indian tribes.

(7) Mandate that the Secretary of the Interior establish and make public specific criteria for accepting Indian lands in trust. Such criteria should include a presumption that lands owned in fee by a tribe or to be acquired in fee shall be accepted in trust unless the Secretary sets forth in writing sufficient reasons for refusal.

(8) Mandate that the Executive examine and report to the Congress on the feasibility of consolidating the Indian land acquisition loan program administered by the Department of Agriculture and the BIA loan programs into one Federal-Indian loan program designed exclusively for providing funds for tribal land consolidation plans. Land should also not be required as collateral for such loans.

79. To provide solutions for the debilitating problems presented by the fractionated ownership of heirship lands, Congress enact legislation which would:

(1) Amend the U.S. Code to enable tribal governments to adopt comprehensive plans for resolving fractionated heirship land problems. Such plans could include the following procedures:

(a) Guaranteeing that tribes have first right of purchase when heirship lands are sold.

(b) Authorizing the holders of a majority of the ownership interests in a trust, or restricted allotment, to determine sale of land.

(c) Enactment of tribal laws governing descent and distribution of fractionated heirship lands to allow purchase, at the time of probate of estates, undivided interest in allotments in heirship status which have reached an unreasonably small fraction; restriction of inheritance of trusts or restricted allotments to members of the tribe; or restriction of inheritance to a life estate with a remainder in the tribe, but only upon payment of fair market value compensation to the prospective heir.

(d) Condemnation with fair compensation by the tribe of lands in heirship status which have reached unreasonable small fractions.

(2) Repeal statutes which are obstacles to exchanges and/or sales between owners of allotment interests.

(3) Reform partitioning laws to facilitate partitioning of allotment interests held by heirs, if partitioning is in the best interest of their heirs and the tribe.

(4) Transfer the probate authority over trust property now held by the Secretary of the Interior of the tribe.

(5) Amend the special laws regarding the Five Civilized Tribes and the Osage to merge them with the general laws governing the other tribes, at least with respect to jurisdiction over small estates ($5,000 or less) and with respect to their capacity to write laws governing the descent and distribution of property.

80. Tribes be encouraged to develop comprehensive plans for long term economic development premised on maximum Indian utilization of Indian owned resources. Recommendations for appropriation of grant moneys to tribes for planning purposes appears in chapters 5 and 6 of this report.

81. Congress enact legislation which will facilitate tribes in acquiring consolidated land areas sufficient to support efficient farm and cattle industries. Specifically, Congress:

(*a*) Amend existing Federal laws relating to leasing of individual trust allotments to provide that tribes should have a "first right of refusal" on leasing of such lands.

(*b*) Elsewhere in this chapter it is recommended that Congress establish a special fund for the purpose of aiding tribes in programs of land acquisition and consolidation. In addition to use of these funds for outright acquisition of ownership, tribes be authorized to draw from this fund in order to acquire leasehold rights in individual allotments. Such authorization must be designed to accommodate the special credit needs of individual allottees which cause them to annually renegotiate what purport to be long term leases.

82. The Bureau of Indian Affairs revise its policies regarding leasing of agricultural lands in the following respects:

(*a*) Rental terms correspond to general lease terms of comparable grade lands held by non-Indians in the surrounding area. Where practicable rentals should be premised on percentage of crop values rather than fixed rates per acre.

(*b*) Leases contain strong conservation requirements with penalty provisions adequate to assure compliance by lessees.

(*c*) Leased properties be inspected as frequently as necessary to insure compliance with lease terms.

(*d*) Tribes be encouraged to contract with the BIA to perform inspection and enforcement duties.

83. The BIA and the tribes develop long-term range management plans to realize the potential benefits of a renewed, high producing grazing range. These plans provide for: (1) range and soil inventories to determine current range capacity; (2) timetables for adjusting herd size to capacity; (3) grazing permit systems; (4) development and prudent use of range improvements to raise the carrying capacity; and (5) education programs to promote good range management practices.

In addition, these plans evaluate the short term economic impact which diminishment of herds will cause to individual Indians during the period necessary to regenerate such rangelands. A program similar to the past "Soil Bank" program should be instituted to provide incentive to individuals to reduce their livestock holdings.

84. The Bureau of Indian Affairs implement programs necessary to provide technical assistance and training to tribal people to aid them

in adopting modern farming and range management. Specifically, the BIA:

a. Review its funding requests for support of State extension services and seek additional funds for this purpose as appear necessary.

b. Develop vocational education programs to be offered at the reservation level to train adults and students at the secondary educational level in techniques in agriculture, range management, and other subjects relevant to natural resource development.

85. Congress hold oversight hearings to ascertain the adequacy of the current funding level of the revolving loan fund for purposes of agricultural and livestock development.

86. In order to clarify the legal authority for Indian tribes to regulate, manage, and sell their own tribal resources, Congress amend: 25 U.S.C. § 406—Sale of Timber on Lands Held in Trust; and 25 U.S.C. § 407—Sale of Timber on Unallotted Lands.

25 U.S.C. § 406 Sale of Timber on Lands Held Under Trust.

Amend § 406(a) by inserting a period after Interior in line 3 and striking the remainder of the sentence and the following sentence.

Amend § 406 by adding a new paragraph at the end of the section as follows:

(g) Bonds for performance and reclamation pursuant to contracts under this section may be required by the Secretary or the owner of the timber in accordance with provisions under § 407.

25 U.S.C. § 407 Sale of Timber on Unallotted Lands.

Amend § 407 by designating the present section as paragraph (a). In line one after "sold" insert "by authority of the tribal council with approval of the Secretary of Interior". In line four, insert a period after Interior and delete the remainder of the paragraph. At the end of the paragraph insert a new sentence: "Regulation of timber sales under this section and § 406 may be superseded by regulation pursuant to tribal constitution, charter, or ordinance, provided that such regulation is not inconsistent with the provisions of this section."

Amend § 407 by adding a new paragraph (c) to read as follows:

(c) Nothing in this section shall prevent the adoption by the tribal council of regulations for the management of natural resources within the reservation, and after such regulations have been approved by the Secretary of the Interior they shall be controlling and regulations by the Secretary of the Interior under this section which may be inconsistent therewith shall no longer be applicable.

87. To resolve the difficult problems in management in the continuing waste of Indian timber resources occurring because of the fractionated heirship pattern of ownership of forested allotments, Congress amend existing Federal law relating to:

(1) Sale of timber on trust allotments to provide a first option to the tribes.

(2) Authority to the tribe to acquire existing powers of attorneys now held by the BIA upon a showing that the affected allotted lands have been included in a comprehensive tribal forest management plan.

88. The BIA make a study of its existing forest management practices and regulations.

A special task force be formed comprised of experts in the areas of forest management to evaluate the present BIA forest management program and develop a modernized comprehensive forest management program for the future use of the Bureau and the tribes. The members of this task force be drawn from the the public and private sectors of the forestry industry and include timber managers of Indian tribes and the BIA.

89. In order to provide for reforestation and regeneration of the millions of acres of Indian forest which have been clearcut by private companies under sales contracts approved by the BIA, the Congress appropriate funds to enable those tribes affected to undertake the necessary regeneration and reforestation programs.

90. Congress enact legislation to permit tribes to contract with private enterprises or Forest Service for timber management.

91. The Secretary of Interior allow the tribes having legal rights over water to develop their own water codes designed to regulate all forms of water usage.

92. Congress enact legislation to provide for an Indian trust impact statement (as outlined in trust section of his report) any time Federal or State projects affect Indian water resources.

93. The Secretary and the Bureau of Indian Affairs take the following actions or provide tribes with the financial capability to:

1. Inventory all tribal water resources.
2. Complete land use surveys particularly to determine lands which are irrigable or which can use water for other beneficial uses.
3. Conduct adequate engineering studies of the Indian water resources necessary for litigation.
4. Make available to the tribes funds to conduct legal and engineering research regarding particular water resources and to proceed with litigation where necessary.

94. Congress investigate litigation in the San Juan River Basin, the Rio Grande Basin, and the Colorado River Basin, and it likewise investigate the *Walton* cases, the *Bel Bay* case, and the *Big Horn* case to ascertain the scope of Federal conflicts of interest.

95. Congress amend 42 U.S.C. § 666 known as the McCarran amendment to specifically exclude Indian water rights from its provisions.

96. The Secretary of the Interior direct the BIA to work with Indian tribes and the Bureau of Reclamation to (1) identify those Indian lands served by BIA irrigation projects which would most benefit from IMS; and (2) plan and provide guidance to implement IMS on those lands.

97. Congress provide the United States Geological Service and the Bureau of Mines with the funds necessary to compile mineral inventories of all tribal lands. These inventories be field geological surveys using Indian people as trainees. The results be confidential to the tribes.

98. Congress provide the Division of Tribal Resource Development, Bureau of Indian Affairs, with funds to train a minerals negotiating team composed of known international and national experts approved by the affected tribes. These experts would be at the disposal of Indian tribes to aid and advise during negotiations.

99. The Bureau of Indian Affairs discontinue outdated royalty agreements, lengthy lease periods, no readjustment clauses, vague employment and environment clauses, and waivers from tribal taxation. Title 25, §§ 171 and 177 of the Code of Federal Regulations, should make clear that alternatives exist to the outdated lease agreement presently in use.

100. Congress provide funds to the Department of Interior to effectively monitor Indian mineral agreements and insure that production is accurately reported, royalties, and other fees promptly paid, employment and environmental provisions honored. Monetary penalties be imposed for noncompliance.

101. Congress provide funds to set up a low interest loan fund to aid those tribes who wish to engage in joint ventures.

102. Congress provide legislation to prohibit any State taxation of non-Indian mineral developers in their transactions with Indians within the tribal lands.

103. If the tribes decide to enter joint ventures, agreements with developers, ownership and control of minerals and processing be kept in Indian hands. Contracts for work on technology purchases would be examples of such agreements. Funds be made available for tribes to employ legal counsel and geological experts to aid them in their mineral contract decisions whenever possible.

104. The U.S. Government make available technical assistance and teaching personnel in geological fields so that Indians can learn to be surveyors for their own tribes.

105. The present laws be amended to insure tribal control of the development of Indian-owned natural resources including water, coal, oil, uranium, gravel, and clay, and all other minerals. The laws, once amended, be flexible enough to allow the tribes to determine for themselves the best form of organization which will enable them to control development and realize the maximum financial returns from the development of their natural resources.

106. Title 25, §§ 171 and 177 of the Code of Federal Regulations, make clear alternatives exist to the outdated lease agreement (contracts), most immediately with regard to the development of coal. Reclamation regulations also be clarified.

107. Congress amend the Freedom of Information Act to exempt tribal proprietary rights from its application.

108. The United States Bureau of Labor Statistics collect accurate, uniform, and consistent statistics on an annual basis on the Indian labor force on every Federal and State reservation. The Bureau also collect statistics on jobs available on each reservation, by type of economic activity, and should indicate if the job is held by an Indian or non-Indian.

109. The executive branch require the Bureau of Indian Affairs and the Department of Labor to keep accurate and detailed statistics on every participant in federally funded manpower programs. Participant's subsequent job status be monitored for at least 5 years.

110. The executive branch require that the Bureau of Indian Affairs and the Department of Labor coordinate their manpower programs with tribal development programs and Economic Development Administration. EDA specify for the BIA and DOL the manpower requirements for their projects including the setting up as well as the operation. BIA and DOL institute the necessary training programs in advance of the EDA projects.

111. Education of Indians be relevant to the needs of the communities and that emphasis be placed on education and training in hard sciences, business, and administrative management disciplines.

112. The Office of Management and Budget take the necessary action to insure that:

An approach is developed which will coordinate Federal efforts at the reservation level;

Continuous evaluations are conducted of the effect that Federal programs have on the standard of living at Indian reservations including developing information systems to support such evaluations; and

Annual reports are submitted to the Congress on progress made in improving the standard of living of reservation Indians and on any needed changes in legislation to improve the effectiveness of Federal programs.

If early action is not taken, we recommend that the Congress enact appropriate legislation.

113. The executive branch direct the development of physical infrastructure programs through the joint efforts of the tribes, the Department of the Interior, the Federal Aid to Highways System, the Commerce Department, and the Department of Transportation. Such a program be part of a special economic stimulus effort for tribes. It could also include significant increases in the amount of capital to be made available through grants and loans.

114. Congress appropriate sufficient funds to upgrade the existing transportation facilities in the Indian communities and provide for a maintenance program that would not allow a deterioration of existing facilities.

115. Congress enact legislation designed to amend 25 U.S.C. § 1522 to increase the $50,000 limitation on nonreimbursable grants to Indian-owned economic enterprises.

116. Congress enact legislation to insure that funds and technical assistance available through SBA's "(8(a) Program" (25 C.F.R. § 124.8 *et seq.*) and "7(a) Program" (25 C.F.R. § 122 *et seq.*) are extended to businesses which are chartered or operated by tribal governments.

117. Congress enact legislation to insure that the technical and management assistance available through OMBE is extended to Indian business enterprises on the same basis and with the same priority as it is extended to other minority business enterprises.

118. Congress enact legislation to provide that the tribal government may waive its immunity from suit.

119. Congress hold oversight hearings to determine the feasibility of the establishment of an Indian development bank to provide for the demand for capital in Indian country and at the same time recog-

nize and compensate for the unique requirements of lending in Indian country necessitated by the United States trust responsibility. A carefully considered development bank project may go a long way in reversing the existing dependency structure in Indian country thereby reducing Federal transfers over the long run.

120. Congress hold oversight hearings regarding investment of trust funds to determine what legislation is necessary to assure that trust funds draw full interest at prevailing commercial rates.

121. Congress hold oversight hearings with Economic Development Administration, Small Business Administration, Office of Minority Business Enterprise, Department of Labor, Bureau of Indian Affairs, and Department of Transportation to determine what the obstacles are to successful business development in and near Indian communities.

CHAPTER EIGHT.—COMMUNITY SERVICES

The Commission recommends that:

122. Indian Health Service (IHS) establish a formalized mechanism through which IHS officials can work closely with Indian people toward the successful implementation of Public Law 94–437.

123. Congress appropriate sufficient funds for the continuance of present Indian centers in urban areas which assist Indians in obtaining medical and other social services; and should encourage, with funds and guidance, the establishment of additional such centers in all urban areas where Indians live.

124. Congress create in the Office of Civil Rights (OCR) a monitoring and enforcing division targeted at discriminatory urban health providers.

125. IHS receive supplemental fundings for providing outreach medical care to isolated, rural Indians.

126. Congress hold oversight hearings regarding the implementation by IHS of the Indian Self-Determination and Education Assistance Act (Public Law 93–638).

127. Congress hold oversight hearings to determine Indian needs in the areas of health care facilities, construction, and maintenance, and appropriate sufficient funds to meet those needs.

128. Congress hold oversight hearings to ascertain the success of mobile health vans at the Navajo and Rosebud Reservations and on TV satellite formerly used in Alaska; and determine whether these programs should be expanded to isolated, inaccessible areas.

129. Congress hold oversight hearings to ascertain the problems regarding the high turnover in personnel at IHS and act to remedy these problems.

130. Congress create a medical para-professional corps to be used on Indian reservations, particularly in the areas of alcoholism and mental health.

131. IHS be funded to allow the expansion of present training programs so that they are located in individual service units and geared to specific staff shortages in those units.

132. Congress appropriate funds for ongoing orientation programs to educate IHS employees in Indian culture, and to provide for Indian interpreters in all service units.

133. Congress request the General Accounting Office to conduct a management study of the Indian Health Service and periodically to audit all IHS services.

134. The executive branch direct all Federal agencies to report to Congress on problems regarding the coordination of budget cycles and, if necessary, request legislative reform.

135. Congress reorganize the Indian housing program and give one agency the primary responsibility for coordinating and administering the program. Upon establishment of a new independent consolidated Indian agency, as recommended in chapter VI of this report, all Indian housing programs should be transferred to that agency.

136. Congress direct IHS to report on tribal needs for fully equipped ambulances and other vehicles to transport nonemergency patients on reservations and should then appropriate necessary funds to provide such services.

137. The Department of Agriculture review and revamp its food supply system to insure consistent delivery of nutritious, health-giving goods to the Indian people, with particular emphasis on high-risk groups such as infants, children, pregnant women, the elderly, and the handicapped; and, to insure the simultaneous use of both food stamps and donated foods for those tribes desiring it.

138. BIA replace the monopolistic trading post, with its high prices and inferior stock, with as many efficiently managed food stores as are needed for accessibility by Indian people wherever they live on the reservation. These stores be under Indian management.

139. The executive branch upgrade tribal programs for education in the areas of hygiene and nutrition.

140. IHS upgrade the demonstration projects heretofore administered by National Institute on Alcoholism and Alcohol Abuse.

141. Congress enact legislation for the transfer of all Federal education programs from their present agencies to the consolidated Indian agency recommended elsewhere in this report.

142. Congress enact legislation that would aid tribal governments in assuming the responsibility for control of education in accordance with their desires. Such legislation to include:

(*a*) Amendments to Public Law 81-874 and 81-815 such that: (1) the dollars directed to aid schools educating Indian students would be funneled through a tribal monitoring system, then to the school; (2) a set-aside provision is made to cover costs of tribal administration.

(*b*) Amendments to Public Law 93-638 such that: (1) a duly elected board of regents may be recognized as a unit representing tribes and tribal opinion to contract for and administer post-secondary schools with a multitribal population; (2) in the case of multitribal elementary and secondary schools, a duly elected board of regents, including at least one representative from each tribe, be recognized as a unit representing tribes and tribal opinions to contract for and administer those schools.

(*c*) Amendments to Public Law 93-638 and Johnson-O'Malley such that: (1) Any dollars contracted for the education of Indian children through Public Law 93-638 and Johnson-O'Malley would pass through a tribal monitoring system; (2) in utilizing this contract or monitoring power with Public Law 93-638 or

Johnson-O'Malley a tribe may decide the extent to which it wishes to control the educational system affecting its children. This decision runs the gamut from total tribal ownership and control to utilization of the tribal government only as a monitoring system for Indian education moneys; (3) if the tribe opts to set up an organizational unit to monitor funds, a set-aside provision should be made available to cover the costs of tribal administration.

(*d*) Amendments to all Indian education legislation such that: (1) the State or local government not in compliance with agreements and contracts for Indian education programs can be sued by the tribe in a U.S. district court or in a State court of general jurisdiction; (2) the court may grant to the plaintiff a temporary restraining order, preliminary or permanent injunction or other order including the suspension, termination, or repayment of funds, or placing any further payments in escrow pending the outcome of the litigation.

NOTE.—The language of the above two recommendations is taken from H.R. 13367—Revenue Sharing.

143. Congress appropriate funds to accomplish the following objectives:

(*a*) To establish standards for Indian education and develop an accreditation system for Indian schools.

(*b*) To train non-Indians who teach and work with Indian children as an interim measure until there are enough Indian educators.

(*c*) To educate and prepare tribes who wish to organize and operate their own educational systems.

(*d*) To subsidize a long-range effort to train and certify Indian educators for Indian schools.

(*e*) To subsidize curriculum development and library development for Indian schools.

(*f*) To provide an educational clearinghouse for information on teacher availability, new curricula, and special resources flowing between schools and tribes.

(*g*) To give professional Indian educators the opportunity for regular input on new educational methods and resources to the tribes.

144. Congress provide for the improvement of off-reservation boarding schools by enacting legislation to accomplish the following:

(*a*) Define the goals and objectives for each school and create an academic emphasis to fit its goals.

(*b*) Assure that juvenile corrections are the responsibility of the tribe and not the off-reservation boarding school.

(*c*) Organize an admittance and transfer policy for students.

(*d*) Provide for sufficient diagnostic staff and development specialists for each school.

(*e*) Provide a curriculum that is responsive to the students' psychological and academic needs.

(*f*) Assure that teaching and guidance staff are chosen for their ability rather than civil service rank.

(*g*) Give parents and communities the opportunity to contribute ideas and participate in school procedure.

(*h*) Give the school advisory boards real decisionmaking power, as indicated by the Indian Reorganization Act, and organize an elective process for advisory boards and boards of regents for all BIA schools.

(*i*) Set up funding structures to separate off-reservation boarding schools from other BIA-funded schools.

(*j*) Provide adequate financing and standardize accounting procedures and fiscal reports of all schools.

(*k*) Remove postsecondary schools run by BIA from off-reservation boarding school status so the tribes have the option to control staff, budget, programs, enrollment levels, and student body.

145. Congress provide funding through Indian organizations and tribes for scholarships in three academic areas: vocational education, traditional liberal arts education, and graduate level education.

146. Each Indian student who meets the requirements of section 411(a)(1) of the Higher Education Act of 1965 be entitled to a grant in an amount computed under subsection (a) of section 411.

147. Congress enact legislation which would carry out a program for funding and administering Indian postsecondary schools. Such legislation should include:

(*a*) Funds for more Indian owned and operated colleges.

(*b*) Funds for research in the area of Indian higher education to determine students' academic and psychological needs.

(*c*) Funds to assess the needs of tribes and communities for certain types of vocations and professions.

(*d*) Funds to establish liberal arts institutions on or near populous reservations.

(*e*) Funds to establish institutions of higher learning specializing in the culture, languages, and traditions of Indian people.

(*f*) Funds for specialized Indian higher education centers, such as the Center for Indian Law.

(*g*) Federal funding to institutions of higher learning serving Indian students, similar to Johnson-O'Malley funds.

(*h*) Accreditation for Indian postsecondary institutions be provided by an Indian designed and organized board.

148. Congress hold oversight hearings to clarify the division of responsibility between Federal and State agencies involved with Indian affairs—including BIA, HEW, IHS, Office of Civil Rights, and Social and Rehabilitation Services—and direct these agencies to consult with State agencies to determine the causes of the breakdown in the delivery of services to Indians by the States.

149. The BIA and HEW promulgate regulations to clarify that Indian trust money and land is not to be considered an asset by State and county governments in determining eligibility for welfare programs.

150. BIA be required to publish in the Federal Register and in the Code of Federal Regulations their procedures and guidelines for general assistance under the Snyder Act.

151. Procedures and practices used in the BIA's 64 local welfare offices be standardized and made uniform, ending the practice of discretionary action on the part of the local BIA caseworkers.

152. Receipt of State or local general assistance not make an Indian ineligible for BIA assistance when supplemental aid is needed.

153. Congress, by comprehensive legislation, directly address the problems of Indian child placement and the legislation adhere to the following principles:

(*a*) The issue of custody of an Indian child domiciled on a reservation is the subject of the exclusive jurisdiction of the tribal court where such exists.

(*b*) Where an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child be given reasonable notice before any action affecting his/her custody is taken.

(*c*) The tribe of origin have the right to intervene as a party in interest in child placement proceedings.

(*d*) Non-Indian social service agencies, as a condition to the Federal funding they receive, have an affirmative obligation—by specific programs—to:

(i) provide training concerning Indian culture and traditions to all its staff:

(ii) establish a preference for placement of Indian children in Indian homes;

(iii) evaluate and change all economically and culturally inappropriate placement criteria;

(iv) consult with Indian tribes in establishing (i), (ii), and (iii).

(*e*) Significant Federal financial resources be appropriated for the enhancement or development, and maintenance of mechanisms to handle child custody issues, including but not limited to Indian operated foster care homes and institutions in reservation areas, such resources be made directly available to the tribe.

CHAPTER NINE.—OFF-RESERVATION INDIANS

The Commission recommends that:

154. The executive branch of the Federal Government conduct a detailed examination of assistance programs and need areas that would be most expeditiously administered by tribal governments.

155. The executive branch provide for the delivery of services to off-reservation Indians consistent with the Federal obligation to all Indians. Accordingly, Congress recommend that the executive branch deliver appropriate services when feasible through urban Indian centers.

156. The executive branch provide financial support for Indian centers in urban areas. This could be expedited by turning over BIA Employment Assistance Offices and other Federal contracting opportunities to urban service centers; and delegating Federal domestic assistance dollars directly to urban centers on a fair per capita share basis.

157. The executive branch consider the placement of Federal funds targeted for urban Indians under an Urban Indian Office as a part of their considerations for the Consolidated Independent Indian Agency.

158. The Federal agency funding such urban center or centers determine the actual representation of such center or centers according to a process of membership certified to the agency.

159. The executive branch mandate that urban centers receive:

Specific consideration for the receipt of Johnson-O'Malley funds;

Technical assistance and orientation in programing, budgeting, regulations, and funding programs;

Specific roles in program and policy formulation in curriculum development for teaching and administrative staff hiring for schools with Indian children.

Funding for administrative and program costs.

160. The executive branch mandate that urban Indian centers be supported to provide:[4]

A real estate clearinghouse to provide information on available living quarters;

Consumer education programs in the areas of credit procedures, lease information, and general advice on moving from the reservation to an urban area;

Grants for initial moving costs, immediate support, rent supplements, housing improvements; and

The Bureau of Indian Affairs reestablish the program formerly funded providing equity grants for downpayments to urban Indians who have lived in the city for more than 2 years.

161. The executive branch mandate that appropriate action be taken to provide urban Indians with health care facilities by providing the urban Indian center with funds to:

Administer Indian health care programs;

Provide information for health care;

Contract for Indian health care;

Establish health educational programs;

Establish health care programs on its premises; and

Act as a monitor for funds designated for urban Indian health care.

CHAPTER TEN.—TERMINATED INDIANS

The Commission recommends that:

162. Congress by joint resolution specifically repudiate H. Con. Res. 108 and the policies of assimilation and termination that it represents, and commit Federal-Indian policy specifically to Indian self-determination.

163. Congress provide appropriate legislation for an administrative restoration process adhering to the following principles:[5]

(*a*) Purpose of the Act: To establish standards and procedures by which terminated Indian tribes may be restored to the status of sovereign, federally recognized Indian tribes; to restore to terminated Indian tribes and tribal members those Federal rights, privileges, and services to which federally recognized Indian tribes and their members are entitled.

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[4] These funds are presently provided to the Bureau of Indian Affairs for the same purpose.

[5] *See*, AIPRC, report of the Task Force on Terminated and Non-federally Recognized Indians, at 1705 for the proposed "Restoration Act" adhering to these principles.

(*b*) The policy of termination was wrong and Congress expressly recognizes that fact. All reasonable steps be taken to fully and quickly restore Federal recognition to terminated tribes, reestablish their land base, and restore tribal sovereignty. All Federal moneys expended pursuant to the Act should be over and above existing appropriations for Indian affairs.

(*c*) Any terminated tribe may file a "petition for restoration" with the Secretary of the Interior. The Secretary shall grant the petition where: (1) the tribe is maintaining a tribal identity; and (2) restoration is favored by a majority of the tribal members actually voting in an election. The Secretary shall liberally construe the petition in favor of the tribe and any denials of petition shall be without prejudice to the tribe's right to refile subsequent petitions. If a petition is granted, the Secretary and the tribe shall negotiate a restoration plan, the tribe will be eligible for all Federal services and benefits, and all rights of the tribe under Federal treaty, statute, executive order, agreement, or otherwise shall be reinstated.

(*d*) The restoration plan provide for election of an interim tribal council, adoption of a tribal constitution and bylaws, revision of the tribal roll, establishment of reservation land in trust, and other specifics. Congress retains the power to approve or disapprove any restoration plan.

(*e*) Nothing in the Act alters preexisting rights or obligations or affects the status of any federally recognized tribe.

(*f*) The Act be construed in favor of Indians; the Secretary of Interior shall cooperate with tribes seeking restoration; his action is subject to review by a Federal court; and other specifics.

(*g*) Authorization for whatever appropriations are necessary to implement the Act.

(*h*) The Secretary of Interior is authorized to adopt regulations necessary for carrying out the Act.

(*i*) Congress, as an interim measure, recognizing the hardships caused by terminations, by legislation specifically extend appropriate Federal-Indian services to terminated Indians.

CHAPTER ELEVEN.—UNRECOGNIZED INDIANS

The Commission recommends that:

164. Procedures be established so that all tribes will be guaranteed their unique relationships with the United States. After adoption of the following recommendations, the words "nonfederally recognized" and federally "unrecognized" shall no longer be applied to Indian people.

165. To clarify the intention of Congress and to dispel administrative hesitations, Congress adopt, in a concurrent resolution, a statement of policy affirming its intention to recognize all Indian tribes as eligible for the benefits and protections of general Indian legislation and Indian policy; and directing the executive branch to serve all Indian tribes.

166. To insure that the above declaration is carried out, Congress, by legislation, create a special office, for a specific period of operation, such as 10 years, independent from the present Bureau of Indian Affairs, entrusted with the responsibility of affirming tribes' relationships with the Federal Government and empowered to direct Federal-Indian programs to these tribal communities. The office should have a dual function: (1) Affirming the Federal relationship with the petitioning tribes; and (2) negotiating the particular aspects of that relationship within the context of general Indian legislation and Indian law, but with the flexibility to meet each tribe's specific needs.

The first function to include the following procedures:

The office contact all known so-called unrecognized tribes and inform them of their rights to establish a formal relationship with the Federal Government.

Technical assistance be provided for tribes, ensuring that they understand the office's procedures, and that they acquire legal assistance and professional assistance when they desire it for presenting their claims to this office. With the assistance of the special office, or with the assistance of persons designated by the tribe but paid by the office, the tribes may submit petitions for recognition to the office.

As soon as possible, but no later than 1 year after receipt of a tribe's petition, the office must decide on a group's eligibility as a tribe for Federal-Indian programs and services.

That decision must be decided on the definitional factors enumerated below, factors which are intended to identify any group which has its roots in the general historical circumstances all aboriginal peoples on this continent have shared.

At the end of 1 year, through appropriate hearings and investigation, the office must justify any rejection of a group's claim to tribal status with a written report documenting the group's failure to establish its inclusion in any one of seven enumerated definitional factors.

The group may appeal the office's ruling to a three-judge Federal district court, as outlined in recommendation 169.

The second function of the office, to negotiate the tribe's particular status within the Federal-tribal system, is intended to place these newly recognized tribes on a firm footing so that their claims are clear, their rights are affirmed, their special needs are assessed, and so that actions may be taken immediately to improve their health, educational, and economic conditions.

This procedure will acknowledge these tribes' different priorities, and will assist in expediting actions on tribal priorities. It is not intended to be a process for limiting tribes' eligibility for any services or constraining the powers, rights, and special privileges of these tribes. The office will be directed to exercise good faith and trust in delineating the tribes' rights to services and protection of laws governing Indian affairs.

167. Congress direct this special office that for the purposes of fulfilling the Federal Government's obligation for the protection and well-being of American Indian tribes and aboriginal groups and their resources, and for the identification of those groups, the procedure outlined in recommendations 168–171 will be followed.

168. A tribe or group or community claiming to be Indian or aboriginal to the United States be recognized unless the United States acting

through the special office created by Congress, can establish through hearings and investigations that the group does not meet any one of the following definitional factors:

(*a*) The group exhibits evidence of historic continuance as an Indian tribal group from the time of European contact or from a time predating European contact. "Historic continuance" includes any subsequent fragmentation or division of a specific tribe or group, and any confederation or amalgamation of specific tribes, bands, or groups and subdivisions.

(*b*) The Indian group has had treaty relations with the United States, individual States, or preexisting colonial and/or territorial governments. "Treaty relations" include any formal relationship based on a government's acknowledgment of the Indian group's separate or distinct status.

(*c*) The group has been denominated an Indian tribe or designated as "Indian" by an Act of Congress or executive order of State governments which provided for, or otherwise affected or identified the governmental structure, jurisdiction, or property of the tribal groups in a special or unique relationship to the State government.

(*d*) The Indian group has held collective rights in tribal lands or funds, whether or not it was expressly designated a tribe. "Lands" includes lands reserved for the group's exclusive use, occupancy, or related general purposes which have been acquired by the group through Act of Congress, Executive or administrative action, or through such related acts by preexisting colonial and/or territorial governments, or by State governments or through the purchase of such lands by the group. "Funds" includes money designated for the group's exclusive use, possession or related general purposes by Act of Congress, Executive or administrative action, or by such related acts of preexisting colonial and/or territorial governments, or by State governments, or by judgment awards of the U.S. Court of Claims, U.S. Indian Claims Commission, Federal or State courts.

(*e*) The group has been treated as Indian by other Indian tribes or groups. Such treatment can be evidenced by relationships established for purposes connected with crafts, sports, political affairs, social affairs, economic relations, or any intertribal activity.

(*f*) The Indian group has exercised political authority over its members through a tribal council or other such governmental structure which the Indian group has determined and defined as its own form of government.

(*g*) The group has been officially designated as an Indian tribe, group, or community by the Federal Government or by a State government, county (or parish) government, township, or local municipality.

169. If the United States finds that the claimants do not meet any of these definitional factors, such a determination must be made in writing to the claimants and the decision shall be reviewable by a three-judge Federal district court with the burden remaining upon the United States to establish that the claimants are not an Indian tribal community.

170. If the United States affirms through the special office that a claimant tribe or group meets any one of the standards set forth above, it shall promptly begin negotiations with the tribe or group for purposes of extending all benefits and protections of the laws of the United States directed toward Indians to the extent agreed to by the tribe or group. The agencies designated to provide for the negotiation of protection and benefits shall submit to the Congress such additional requests for appropriations as are necessary to fulfill these obligations.

171. Technical assistance be provided by the special office, or by the prime agent of the trust, or by both, so that newly recognized tribes can determine their membership rolls. The process of determining the rolls will entail public notices, the formation of tribal enrollment committees to hear individuals' claims, and written statements of enrollment verification which must be recorded in duplicate by the prime agent of the trust. Tribes must set their own membership standards. This enrollment procedure may begin after the special office informs the group of its recognized tribal status, and may continue after the special office is terminated, although the process should be expedited by the office as fast as possible.

172. Congress appropriate specific set-aside moneys for American Indian community governments and organizations currently not receiving Bureau of Indian Affairs services and programs, to be utilized for program development, planning, and community-based operations. These funds to be an addition to the usual appropriations for the Office of Native American Programs (ONAP) within the Department of Health, Education, and Welfare. Such funds to serve as an interim measure while other Federal departments and agencies are implementing services to all Indians. (It should be noted that there should be a specific set-aside since less than 11 percent of the ONAP grantees during fiscal year 1975 were terminated or "nonfederally recognized" Indian tribes and organizations.)

173. To insure the success of such congressional directive and specific set-aside moneys, the Congress appropriate additional funds for distribution through the Federal departments and agencies on a grantee and nongrantee basis, specifically designed to provide contractual training and technical assistance for American Indian communities at statewide and regional levels. Further, to provide for the continuance of the self-determination without termination concepts surrounding the Indian Self-Determination Act passed in the 93d Congress, individual American Indian community governments and organizations and combinations thereof within a State or regional area are to be encouraged to perform the contractual negotiations with individual contractors, in a cooperative effort with the respective Federal agency. Additionally, to provide the necessary support for the development of non-BIA programs and services, and for the cooperative efforts between Federal agencies and Indian communities in policymaking and policy formation, the Congress stipulate and encourage the utilization and formation of the Indian task force concept on the Federal regional council level. (As such, the presence of an Indian task force at the New England Federal Regional Council has proven over the past few years to be highly effective in the areas mentioned above.)

174. For the purposes of providing effective utilization and improvement of human resources within American Indian communities and

for the successful continuance and rational development of community governments and organizations not currently receiving Bureau of Indian Affairs programs and services, the Congress establish a national Indian scholarship and fellowship program specifically designed to promote the educational development and training of the current Indian leadership within such communities and those young Indian adults who exhibit future leadership qualities and activities.

175. Congress direct the General Accounting Office to immediately proceed with full and complete investigations of the grant award procedures involving: the Office of Indian Education, title IV, parts A, B, and C; and Office of Native American Programs, Tribe and Urban; and the Office of Indian Manpower Programs, sec. 302 of the Comprehensive Employment and Training Act.

176. The Congress extend the statute of limitations as provided in 28 U.S.C. § 2415(b) so as to provide that actions which accrued on the date of enactment of such Act in accordance with subsection (g) thereof may be brought within 25 years after the right of action accrues, so as to provide time for Indian tribes, bands, or groups who have not had access to legal services, effective legal research, and effective historical research to seek redress through actions brought by the United States on their behalf under the Act.

177. The Census Bureau be directed to implement the recommendations suggested by Task Force Ten on pages 1703–1704 of its final report, so that so-called unrecognized Indians will be identified in the 1980 census.

CHAPTER TWELVE.—SPECIAL CIRCUMSTANCES

The Commission recommends that:

178. Congress enact legislation prescribing the order of preference in which applications for benefits under Federal laws and programs will be received from the several kinds of Alaska Native organizations qualified as applicants.

179. Congress enact legislation confirming that the Tlingit and Haida Indians constitute a single tribal entity of which the Central Council is the general and supreme governing body.

180. Congress enact legislation confirming that the authority of the Secretary of the Interior to reserve easements on lands to be conveyed to Native corporations under the Settlement Act is strictly limited to definitely defined easements across such lands and at periodic points along the courses of navigable waterways that are necessary to discharge international treaty obligations and to provide access to remaining public lands. Specifically, Congress make clear that the Secretary is without authority to reserve any lineal easements along shorelines, any nonspecific floating, or blanket easements, or any easements to provide others with any rights to enter upon any lands (including water beds) to be conveyed to the Native corporations for any purpose other than to cross such lands by defined routes to reach remaining public lands.

181. Congress enact legislation confirming that the Secretary of the Interior is not required, prior to conveying lands to Natives and Native corporations under the Settlement Act, to prepare impact statements pursuant to the National Environmental Policy Act.

182. Congress enact legislation requiring the Secretary to convey all lands and estate and interests in lands that the Natives and the Native corporations are entitled to receive under the Settlement Act no later than December 31, 1978.

183. Congress increase its oversight relative to the carrying out of the Settlement Act in general, and relative to the conveying of lands to the Native corporations in particular. Congress require the Secretary to report to it not less frequently than once every 3 months until it is satisfied that all lands to which the Native corporations are entitled under the Act have been conveyed.

184. Congress appropriate funds to provide the advance payments into the Alaska Native Fund that were authorized by § 407(a) of the Act of November 16, 1973, 87 Stat. 591, to ameliorate the adverse impact on the Alaska Natives of delay in construction of the Trans-Alaska Pipeline.

185. Congress take no action in implementing the provisions of § 17(d) of the Settlement Act, or otherwise, that would have the effect of diminishing or impairing the ability of Alaska Natives to make use of any lands or of the products thereof (including fish and animals), for subsistence purposes, or that would have the effect of restricting the uses that Native corporations might make of, or the activities they might conduct on, any land conveyed to them under the Settlement Act.

186. Congress enact legislation permanently exempting lands conveyed to Native corporations under the Settlement Act from State and local taxation, so long as they are not developed or leased, and during periods such lands are not productive of income, whether or not they were previously developed or leased.

187. Not later than during the 1st session of the 101st Congress or 1989, Congress undertake a comprehensive examination of the condition of the Alaskan Natives and of the results of the Settlement Act, with a view, particularly, to determining whether the tax exemptions and the period of inalienability of stock currently provided by the Settlement Act should be expanded or extended.

188. Congress conduct hearings to examine the problems that have arisen in interpreting and effectuating § 7(i) of the Settlement Act and to determine whether further legislation is desirable.

189. The findings and recommendations applicable to Indians generally are part of the Federal-Indian policy and are equally applicable to the Indian tribes and people of Oklahoma without distinction and that no tribe or community of Indian people should be denied the benefits or advantages of Federal-Indian law or policy solely because they are found within the boundaries of the State of Oklahoma.

190. Congress repeal those laws which presently restrict or remove from the tribes of Oklahoma the full measure of jurisdictional and governmental powers enjoyed by other tribes in States unaffected by P.L. 83–280. To the extent that the State of Oklahoma lawfully exercises jurisdiction over Indians or Indian lands at present that jurisdiction should remain as concurrent with the tribal powers, pending the assumption of full jurisdiction by the tribes.

191. For those tribes found lacking an adequate legal base for present assertion of tribal governmental powers, Congress provide by appropriate legislation for the reassumption of Federal jurisdiction

and tribal jurisdiction to the exclusion of State jurisdiction adhering to the following principles:

(*a*) Reassumption of Federal jurisdiction and tribal jurisdiction to the exclusion of State jurisdiction be to the same extent as are found on reservations in States not presently exercising Public Law 83–280 jurisdiction or other jurisdiction pursuant to special jurisdictional statutes for that State.

(*b*) The extent and limitations, including any timetables for partial or total assumption of jurisdiction be at the option of the tribe which shall prepare a plan for same.

(*c*) There be direct financial assistance made available to the tribe or intertribal group which includes a Secretarial designation necessary to qualify for LEAA discretionary funds. LEAA Act also be amended and directed to make funds available for planning and preparation prior to assuming law and order functions.

(*d*) The plan presented by the tribe or intertribal group reflect consultation with State and local governments concerning transition activities and to reflect cooperation or lack thereof. State and local governments shall have no veto over the plan.

(*e*) The plan be presented to the Secretary who shall:

(i) Act within 120 days to approve or disapprove the plan, and failure to act within that time shall be considered approval;

(ii) Base disapproval of the plan solely upon the basis of the inadequacy of the plan giving specific reasons and providing technical assistance and resources necessary to meet the inadequacies where possible.

(iii) Within 120 days after the passage of the Act, the Secretary shall draft standards for determining the adequacy of a tribal plan, which standards shall be sent to the individual tribes of Oklahoma who shall have not less than thirty (30) days to prepare comments on the standards proposed by the Secretary. The Secretary shall submit to Congress within 200 days after passage of the Act the proposed standards with tribal comments.

(*f*) Rejection of a tribal plan by the Secretary shall be appealable to a three-judge district court in the District of Columbia, and the Department of the Interior shall pay all reasonable attorneys fees and costs of the tribe or intertribal group as determined by the Federal court except where such appeal is deemed to be frivolous.

192. The Bureau of Indian Affairs be directed to review its past allocations of funds among its service areas to determine whether Indians in all of its service areas are receiving equivalent services. In those service areas where significant underfunding and/or disparity in allocation has occurred, immediate "equity adjustments" should be made.

193. The system of using past budgets as a data base to establish either floors or ceilings on current or future budgets not be rigidly enforced. This is particularly true in those areas where past budgets have failed to properly provide for the needs of its service population.

194. The Indian Health Service review its service delivery to Indians in California to determine whether its service population in California is receiving health care equivalent to that of Indians in other areas.

195. Congress require each of these agencies to report on their findings regarding past inequities in fund allocations among their different service areas and require each agency to specify the procedure it will follow in future budget developments to avoid repetition of this occurrence.

196. Congress reject any legislative solutions which would completely eliminate claims of tribes based on aboriginal rights in land and claims to damages.

197. The appropriate committees of the House and Senate to which aboriginal and claim abolishment bills have been referred refrain from holding hearings until the White House mediator has had an opportunity for mediation with all parties concerned. The committees should be guided by the recommendations of such mediator.

CHAPTER THIRTEEN.—GENERAL PROBLEMS

The Commission recommends that:

198. The National Endowments for the Arts and Humanities, the Library of Congress, the American Folklore Center, the Smithsonian Institution, and all Federal agencies which fund Indian cultural activity be directed by Congress to redesign all regulations and guidelines to:

(*a*) Consider Indian projects along with all other proposals.

(*b*) Use a revolving membership panel, changed every 2 years, of Indian and non-Indian scholars to review proposals on Indian-related projects.

(*c*) Provide grants to Indian-controlled activities which involve Indian tribal peoples, agencies, scholars, and culture carriers as the primary beneficiaries, recipients, and users of the end product.

(*d*) Mandate that all projects which relate to Indian cultural affairs be accompanied by a "cultural impact" statement delineating the cultural worth to Indian peoples of preserving, enacting, performing, recording and filming the materials or programs, including the impact on traditional expressions, cultural institutions, and economies of the peoples involved.

(*f*) Reject projects which do not thoughtfully accommodate cultural differences between tribes.

199. The Smithsonian Institution, the National Endowments for the Arts and Humanities and all agencies which fund traineeships in cultural programs (*i.e.*, museum curator programs) train American Indians. Priority in funding be given to those agencies which demonstrate an intent, readiness, and capability for training American Indians to ensure long-term benefits.

200. A clearinghouse for the study of American Indian cultures be established (modeled after the Educational Resources for Instruction Clearinghouse) for Indian cultural materials, projects, and programs.

201. A review agency for funding Indian cultural programs be established. It would be designated to act on behalf of tribes, agencies, educators, programs, institutions, and individuals needing assistance in curriculum development, provision for material and human resources related to cultural programing and proposals for cultural programs, media efforts, or other educational and cultural materials which use Indian artifacts and language. Indian scholars and computer retrieval experts would serve as the base staff for the clearinghouse, which would have the authority to use Federal services allotted to Federal agencies. The clearinghouse would serve as the liaison between Indian institutions and public agencies—pre- and post-collegiate educational institutions, tribal organizations, urban centers, training programs, archival and museum resources, and governmental agencies—to insure maintenance and support of Indian cultural networks and resources.

202. A feasibility study be done on the creation of an Institute of American Indian Culture. An analysis should include the possibility of creating a center of knowledge capable of conferring Ph. D. degrees.

203. Congress, by suitable legislation, require mandatory training in Indian history, legal status, and cultures, of all government employees administering any Federal Indian program or State or local Indian program funded in whole or in part by Federal funds.

204. Congress, by appropriate legislation, appropriate funds to assist school systems in developing educational programs in Indian affairs. Such funds be made available for:

(*a*) An evaluation of the history and government curricula utilized by elementary, secondary, and higher education institutions.

(*b*) The identification of gaps and inaccuracies in such curricula.

(*c*) The provision of model curricula which accurately reflect Indian history, tribal status, and Indian culture. In making this recommendation, it is not the intent of the Commission that such program constitute an "official history." Rather, the intent is merely to encourage scholarly work to fill a recognized void in current educational programs.

205. Congress refer the entire report of the Commission Task Force on Consolidation, Revision, and Codification of Federal Indian Law to the appropriate committee or committees to bring the work to completion.

Optimally, referral be to appropriate committees of the House and Senate or to select committees in each House with sufficient time and funds to complete the task.

The committee(s)' work be conducted through a process of consultation with Indian people.

206. Congress authorize the Library of Congress and, if necessary, appropriate funds to:

(*a*) Create a Native American Studies Division in the Library with a central reference area and a research support staff of Native American specialists. The contents of such a collection to be determined by the Library staff, but to consist of at least the basic reference works most frequently used in Indian affairs research by both scholars and those active in public affairs.

(*b*) Compile for publication, a collection of Native American studies resources consisting of: bibliography of basic reference tools for research in all aspects of Indian affairs, indexed by subject matter; a bibliography of bibliographies relating to Indian affairs; and a directory of research sources for Native American studies, including but not limited to specialized collections such as those in the Department of the Interior Library, the National Indian Law Library in Boulder, Colo., and the Newberry Library in Chicago, Ill. Such a research guide to contain materials located in the Library of Congress or other depository libraries accessible to the public and be made available for sale to the public and updated periodically.

(*c*) The Selected Dissemination of Information System (S.D.I.) maintained by the Congressional Research Service of the Library of Congress expand its coverage of publications containing Native American articles and be made available for sale to the public.

(*d*) In response to these recommendations, the Librarian of Congress be directed to report to the Congress the estimated cost of these changes and projects and the estimated time for their completion. In addition, the Librarian be directed to make a feasibility study to determine the requirements for undertaking a definitive retrospective bibliography of all Native American research materials, indexed by subject matter.

CHAPTER ONE

CAPTIVES WITHIN A FREE SOCIETY

FEDERAL POLICY AND THE AMERICAN INDIAN

The view of American history from the Native American side of the frontier offers a curiously reversed image of the rise and fall of nations. Commonly, historians of the United States describe the period 1607 to 1776 as the "colonial period." For most Indian tribes this same stretch of years represents a period of relative independence and equality between red nations and white colonies. . . . America's "rise to world power" entailed the reduction of the Native Americans to the status of a captive population, euphemistically termed "wards."

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CHAPTER ONE

CAPTIVES WITHIN A FREE SOCIETY

FEDERAL POLICY AND THE AMERICAN INDIAN

[An historical review commissioned by the American Indian Policy Review Commission, and prepared under the direction of D'Arcy McNickle, Sc. D., Center for the History of the American Indian, The Newberry Library, Chicago, with contributions from Mary E. Young, Ph. D., Professor of American History, The University of Rochester, Rochester, New York (Part I, the Formative Years: Policy Development Through 1871), and W. Roger Buffalohead, Ph. D., Assistant Professor, American Indian Studies and History, University of Minnesota, Minneapolis, Minnesota (Part II, The Strategy of Assimilation: Policy Development, 1871-1920).]

The Formative Years—Policy Development Through 1871*

The view of American history from the Native American side of the frontier offers a curiously reversed image of the rise and fall of nations. Commonly, historians of the United States describe the period 1607 to 1776 as the "colonial period." For most Indian tribes, this same stretch of years represents a period of relative independence and equality between red nations and white colonies. The "winning of independence" in 1783 transferred power to white Americans organized as a new nation and reduced the independence of the Indian nations. For nearly all the tribes, the period 1848–1871, marked by the inauguration of the reservation system and concluding with the abolition of the treaty system, represents for the tribes the beginning of a long "colonial period." America's "rise to world power" entailed the reduction of the Native Americans to the status of a captive population, euphemistically termed "wards."

During the seventeenth and eighteenth centuries, European powers followed the practice of treating Indian tribes as sovereign political communities, or nations. Formal treaty negotiations established boundaries and trade relationships. This policy of treating the various bands and tribes as nations reflected the Indians' military and diplomatic strength, as well as the competition among European sovereigns—and even among the various British colonies—for the natives' allegiance, trade, and military support.

The practice of treatymaking often reflected gross ignorance of native political organizations and the extent to which chiefs enjoyed centralized coercive political power and moreover, the negotiating process itself often encouraged factional rivalries among local Indian leaders. Nonetheless, the challenge of maintaining profitable relations with European powers also encouraged attempts on the part of tribal leaders to develop more centralized authority.

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*Prepared by Professor Mary E. Young, University of Rochester.

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Though colonial governments attached great importance to acquiring land, the international trade in hides and furs dictated most economic relationships between Europeans and Indians in the seventeenth and eighteenth centuries. The tribes accommodated their hunting practices and patterns of residence and warfare to the demands of the fur trade, and soon found themselves dependent upon European tools and fabrics. While many coastal tribes became fragmented, accepted reservation status, or virtually disappeared before advance of settlement, the larger Indian nations of the Great Lakes and Appalachian regions retained their political independence.

Immediately following the War for Independence, United States negotiators tried to impose the status of conquered nations on the several tribes who had allied with the British. According to the "conquest theory" the native had forfeited all legitimate claims in their tribal territories within the areas surrendered by the British. However, tribes north of the Ohio did enough damage to the United States army in the 1780's and early 1790's to convince the President and Secretary of War that the "conquest" doctrine was unworkable. Consequently, Secretary of War Henry Knox proposed to treat the tribes as foreign nations, to secure their consent to such land cession as they might be willing to grant, and to make them good neighbors by "civilizing" them. Knox proposed to equip the natives with hoes, ploughs, and spinning wheels, and send the agents who might convince them to adopt laws modeled after white man's laws, private property, schools, and the Bible.

THE IDEA OF ASSIMILATION

After the Louisiana Purchase (1803) President Thomas Jefferson elaborated on Knox's formula. Jefferson realized that the Indians' shift from subsistence hunting to gathering furs and skins for an apparently insatiable market was gradually exhausting the supply of game in much of the area east of the Mississippi. The President encouraged United States "factories" engaged in the Indian trade to extend credit and to suggest that the tribes settle their mounting debts by selling land. Even after 1822, when the Government got out of the fur business, this method of settling debts subsidized a generation of private trading companies, whose obligations were routinely written into the provisions of various treaties. Jefferson and his successors believed that selling their hunting lands would give the Indian enough money to develop what remained, and that the loss of hunting territory would provide incentive to take up intensive agriculture and introduce the idea of treating improved farm land as private property. Those who could not make the grade as civilized farmers could then move into territory west of the Mississippi.

Statesmen of the new American republic thought their system of managing Indian affairs superior to that of the British, for Americans took their civilizing mission seriously. Washington, Jefferson, and their successors frequently congratulated themselves on the benevolence of their policies and intentions. Thus, even as they acknowledged a degree of political autonomy in the tribes, their conviction of the natives' cultural inferiority led them to interfere in their social, religious, and economic practices. Federal agents to the tribes not only negotiated treaties and tendered payments; they pressured husbands to take up the plow and wives to learn to spin. The more conscientious agents offered gratuitous lectures on the virtues of monogamy, industry, and temperance. Beginning in 1819, Congress regularly appropriated $10,000 a year to support Christian missionary teachers of various denominations who sought to remake Indian culture on the Anglo-American model. Not until the 1890's did anyone seek to disestablish this unconstitutional alliance between religious societies and the state.

In political terms, Jefferson's program of "civilization" reflected not only the demands of an expanding white population, but the capture of the United States Government by men more deeply concerned with acquiring agricultural land than with the export of furs. Jefferson and his immediate successors hoped that some combination of the progress of "civilization" among the Indians, the shortage of fur-bearing animals in the East, and judicious bribery of tribal leaders would gradually and peaceably assure the United States' acquisition of Indian lands and the assimilation or removal of the natives.

This gradual process failed. The bribery of tribal chiefs fostered militant factional resistance among the Ohio River tribes, who allied with the British during the War of 1812. Simultaneously, the Creek Nation, of Georgia and Alabama, carried on its own war against the whites of the southeast. These tribes who followed much of Jefferson's prescription for acculturation, responded to pressures for land cessions by centralizing the control of their national governments in the hands of sophisticated leaders dedicated to maintaining the territorial and administrative integrity of their nations.

The Cherokees, noted for their "progress" in farming, literacy, journalism, constitutionmaking and Christianity, proved adamantly insistent on maintaining their territory in Georgia, North Carolina, Alabama, and Tennessee. When the Federal Government, under Andrew Jackson's direction, and the State government of Georgia pressured them outrageously, the Cherokees proved sophisticated enough to take their case to the Supreme Court.

Today, Andrew Jackson is best known as the "Hero of New Orleans," in honor of a battle he won against the British after the conclusion of a treaty of peace. At the Battle of Horseshoe Bend, Jackson not only defeated the Creek Nation, but paved the way for the cession of millions of acres of cotton land from the southeastern tribes to the United States.

When Jackson attained the Presidency in 1828, he had received his strongest support in the States with large Indian populations. He served his constituents with a two-pronged attack on tribes that would not voluntarily sell their land and move west. He encouraged Georgia, Alabama, and Mississippi to extend their jurisdictions over the Cherokee, Creek, Chickasaw, and Choctaw Tribes within their borders. The States subjected individual Indians to State laws and, in some cases, denied them the right to testify in court or to vote. Such laws encouraged intrusion on Indian lands, the abuse of persons, and the theft of property. Jackson also persuaded Congress in 1830 to pass the Indian Removal Act,[1] appropriating half a million dollars to enable the President to negotiate with tribes east of the Mississippi for removal. The funds permitted officials of the War Department to bribe tribal leaders and buy out individual Indians' farms and improvements, such as stores or ferries. These actions undermined the unity of tribal governments that resisted removal. In defense of his policies, Jackson insisted that the civilization program had affected only a small minority of mixed-blood Indians who enjoyed undeserved prosperity and tribal authority; that to continue to treat the "miserable remnants" of Eastern tribes as sovereign nations and their corrupt leaders as heads of sovereign states was unrealistic to the point of absurdity.

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[1] 4 U.S. Stat. 411–413.

Jackson and his supporters were correct in their perception that the tribes—whether a few hundred "remnant" Peorias or several thousand "remnant" Cherokees—could no longer protect their sovereignty through military actions. United States laws and treaties theoretically afforded them the protection they needed. Treaties defined and guaranteed borders between Indian nations and the surrounding States, and the Intercourse Act of 1892 [2] prohibited intrusion on Indian land. Federal courts pursuant to treaty agreements were exercising jurisdiction over crimes committed by whites in the Indian country. Yet none of these legal remedies proved effective. Insofar as the tribes had accepted qualifications upon their sovereignty—such as extraterritorial court jurisdiction—for the sake of receiving United States protection, they relied upon remedies of small practical use.

THE COURT AS DEFENDER OF SOVEREIGNTY

The Cherokees, believing that both the extension of State laws and the President's refusal to use his powers under the Intercourse Acts to expel intruders from their midst, violated United States treaty obligations, took two cases to the Supreme Court. In the first, *Cherokee Nation* v. *Georgia* [3] the Court held that the Cherokees could not sue on their own behalf as a foreign nation because they were not a foreign nation. In a second, *Worcester* v. *Georgia*,[4] a majority of the Court upheld the Cherokee reading of the constitution. Chief Justice John Marshall argued that while Indian tribes within United States borders could no longer be classed as truly independent foreign nations, they had proved capable in law and fact of self-government within the borders guaranteed them by treaty; and that they should be acknowledged as "domestic dependent nations" with full powers over their internal policy, subject to no State's jurisdiction. Unfortunately for the Indian nations, Andrew Jackson refused to acknowledge the validity of Marshall's contentions or to employ the army to protect tribal territories. Georgia courts refused to register the writ of the Supreme Court in the *Worcester* case. The State extended its jurisdiction to the point of granting Cherokee lands to white citizens of Georgia, and Jackson's agents promoted both State interference and tribal factions.

In December, 1835, a United States Commissioner signed a removal treaty with 79 Cherokees [5] who had no legal standing as tribal representatives under the written constitution the tribe had adopted in 1827.

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[2] 2 U.S. Stat. 141–142.
[3] 5 Peters, 1–89 : 1831.
[4] 6 Peters 515–597.
[5] Kappler, 1904 ; pp. 439–449.

The Senate confirmed the treaty. By such tactics, Jackson and his immediate successors secured the removal of nearly all the large independent tribal groups east of the Mississippi.

The removal treaties provided for the exchange of lands, often on an acre-for-acre basis, wherein the tribes traded their holdings within eastern States and organized territories for grants in the area of present-day Oklahoma, Kansas, Nebraska, and Wisconsin. At the time, the exchange placed the Indian nations outside the boundaries of organized States and territories and thus, theoretically, enhanced the likelihood that they might enjoy self-government. Jackson and his Secretaries of War frequently tried to persuade tribal leaders that only removal would preserve the existence of their nations. Yet the removal process itself undermined the social and political structure of the tribes. Many chiefs who signed removal treaties so discredited themselves that they had to sever their relations with their tribes and did not themselves remove. For example, Greenwood Laflore of the Choctaw Nation became a Mississippi planter and served in that State's legislature; the majority of the Choctaw Tribe migrated to Oklahoma without their former chief. Hundreds of Choctaw villagers remained in eastern Mississippi, but as effectively stateless persons. The United States did not recognize the Mississippi Choctaws as a tribe until 1918.

Both the bitter factionalism engendered by conflicts over the signing of removal treaties and the ultimate helplessness of all the tribal leaders who tried to retain their homelands tended to erode the legitimacy of public authority within the tribes. Emigration took a grim toll of life and health among the involuntary Indian emigres. Tribal populations became dispersed geographically between eastern fragments and western "nations." All these processes undermined the unity and stability of the tribal nations.

Some advocates of removal believed that a western Indian territory, governed by a federation of tribes, might be established on a permanent basis with representation in Congress. Once the tribes had been removed, most United States officials lost interest in this project, while the diversity of tribal cultures and the value the tribes attributed to their special claims under treaties undermined Indian support for the proposed federation. Though proposals for organizing "Indian territory" continued to surface from time to time, the tribal nations remained separate and unequal.

WESTERN EXPANSION

Few persons of Andrew Jackson's generation foresaw the dramatic acceleration in the pace of settlement and territorial exploitation that would ensue from the coming of the railroad. Within the generation following Jackson's death (1845), the eastern tribes which presumably had removed to permanent homes in Kansas and Nebraska were divested of their newly acquired lands to accommodate settlement along the lines of the transcontinental railroads and their branches. The Mexican cession (1848) brought the southwestern tribes clearly within the United States jurisdiction. The discovery of gold in 1848 drew thousands of migrants along trails passing through Indian country and directly into territory occupied by the Indians of California. Protection of the Oregon and California trails, the various railroad surveys, and scores of burgeoning mining communities required that the tribes be brought under United States control. The western tribes had little experience with treaty negotiation and comparatively slight contact with Anglo-Americans. Most tribesmen showed minimal interest in accommodating their own cultural patterns to pretend that the Dakota or the Comanche might be "civilized" before ceding their hunting grounds. Two decades of warfare reduced their defensive strength and forced them onto reservations whose resources could not sustain their traditional mode of life.

While United States agents recognized as de facto the authority of tribal leadership, reservation populations were treated as wards of the Government rather than as citizens of a separate sovereignty. The United States continued to negotiate treaties with the tribes until 1871, but in the 1850's and 1860's, the treaty process became a device for eroding the independence of tribal governments and for legitimizing interference both by Congress and by the executive in the day-to-day management of tribal society.

When the Department of the Interior took form in 1849, Congress officially shifted control of Indian affairs from the War Department to the new "Home" Department. The transfer reflected congressional hopes, as Senator Jefferson Davis expressed them, that "war being the exception, peace the ordinary condition, the policy should be for the latter, not the former condition." [6] More certainly, the reorganization placed Indian affairs firmly in the realm of domestic business and, as Davis put it, indicated Congress' intention that dealings with Indians should "assume a character consonant with the relations of guardian and ward." [7]

The shift signaled no diminution of Indian warfare—more nearly the reverse. The army continued active both in fighting and in managing Indians; veteran Civil War officers returned to their vocations as Indian fighters and Indian agents. President Grant's Peace Policy, inaugurated in 1869, supplanted military agents with men nominated by the various religious denominations. Grant accompanied this genteel reform with the appointment of a Board of Indian Commissioners. The commissioners, mainly businessmen of humanitarian propensities and an established interest in educational and other reforms relating to children, undertook to review Indian policies and to supervise contract compliance on the part of those who supplied rations, clothing, and other goods to the reservations. The Grant reforms reflected the Government's inclination to regard Indian populations as dependent wards of a hopefully benevolent American sovereign.

THE DISSOLUTION OF TRIBAL TERRITORY

Jefferson's dream of assimilation—of transforming tribal peoples into independent, literate, land-owning farm families—continued to influence policy in the 1850's and 1860's. The various Commissioners of Indian Affairs reiterated their conviction that private property in land offered the key to civilization. Each head of an Indian family or single person over 21 should receive a plot of land; the remaining tribal property should be sold to support education and agricultural improvement—in other words, to discharge the Government's financial obligations to the tribe at tribal expense. This self-financing method of obtaining Indian title had been applied in various ways to the Creek, Choctaw, and Chickasaw Tribes of the Southeast on the occasion of their removal in the 1830's. It produced an orgy of speculation in Indian land claims, but few Indian homesteaders. Commissioner George W. Manypenny nonetheless supplied the same remedy in the 1850's to tribes in Kansas and Nebraska whose domains lay in the path of proposed transcontinental railroads. In addition, treaties of the 1850's and 1860's with tribes of the eastern plains, Minnesota, and the Northwest provided for prospective allotment of land at the President's discretion. The model for such treaties, often cited in subsequent agreements, was the Omaha Treaty of 1854, which provided that the President might "from time to time at his discretion" have all or part of the territory reserved to the Omahas surveyed and allotted, in quantities of from 80 to 640 acres, proportioned to family size, and award the allotments to those who would locate on them as a permanent home. Although the allottee would receive restricted patents, the treaty provisions foresaw the likelihood that States might revise the restrictions with the consent of Congress.[8]

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[6] 30 Cong., 2d sess., Congressional Globe, app., p. 678.
[7] Ibid., p. 678.

The notion that Indians who received individual allotments should eventually become citizens of the States where they lived—and the concomitant assumption that tribes should cease to exercise jurisdiction over them—was embodied in general allotment agreements as early as the Choctaw Treaty of Dancing Rabbit Creek in 1830.[9] Beginning with a Georgia law of 1828, several of the southeastern States extended jurisdiction over "their" Indians, and granted them more or less restricted rights of citizenship. Such laws were aimed principally at removing the Indians, and they proved relatively successful, despite the fact that the Supreme Court decision in *Worcester* v. *Georgia* invalidated the State's attempt at assuming jurisdiction.

In the wake of the resumption of general allotment treaties in the 1850's, the Court spoke again on the questions of jurisdiction and citizenship, reaffirming Marshall's position. Several Kansas counties attempted to tax lands allotted under various treaties to the Shawnee, Wea, and Miami. Upholding the Indians contention that allotments were not taxable, the Court argued that regardless of particular treaty restrictions on the allotee's right to convey land or encumber its title, all Indian lands, including allotments, were exempt from State jurisdiction. The Court held that the Federal Government's intention in removing the tribes was to place them beyond State jurisdiction and that the law organizing Kansas Territory and admitting Kansas to statehood explicitly commanded that Indian rights remain unimpaired. Further, the Court maintained that so long as tribal organizations persisted, the regulation of Indian property lay with the tribes and the Federal Government, precluding State jurisdiction. Indians might live among a largely white population, follow most of the customs of their white neighbors, sue in State courts and vote in elections without losing the status of tribal citizens. "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the

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[8] Kappler, 1904: pp. 612–613.
[9] Kappler, 1904: pp. 310–318.

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government as existing, then they are 'a people distinct from others' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the union." [10]

The Court pointed out that the Shawnee had their own elective government and their own laws and customs; only another treaty or voluntary abandonment of tribal organization might change their status. Clearly, the Court did not regard the possession of tribal land in common as an essential feature of tribal organization.

In the contemporary case involving the Wea, the Court identified the intent of the allotment treaties as hostile to tribal organization, but insisted that allotment as such did not terminate the tribe. "The basis of the treaty, doubtless was, that the separation of estates and interests would so weaken the tribal organization as to affect its voluntary abandonment and, as a natural result, the incorporation of the Indians with the great body of the people.

"But this result, desirable as it may be, has not yet been accomplished with the Wea Tribe, and, therefore, their lands cannot be taxed." [11]

Nonetheless, a generation in advance of congressional legislation providing for allotment of Indian lands at the discretion of the Executive, treaties negotiated with theoretically sovereign tribes granted the President the effective right to dissolve tribal territories.

ENCROACHMENT UPON TRIBAL SOVEREIGNTY

Other treaties of the period granted far-reaching discretion in the President and Congress to govern the tribes and to regulate the lives of individual Indians. The fifth article of the 1855 Agreement with the Ottawas and Chippewas provided for the dissolution of their tribal organization, except for purposes of effecting the provisions of the treaty.[12] The Sac and Fox Treaty of 1859 asserted, "in order to render unnecessary any further treaty engagements . . . it is hereby agreed" that the President with the assent of Congress would have full power to modify any previous treaty "to whatever extent he may judge to be necessary and expedient for their welfare and best interests." [13] The Cheyenne and Arapaho Treaty of 1867 granted Congress power to legislate "on all subjects connected with the government of said Indians on said reservations, and internal policies thereof, as may be thought proper." [14]

Meanwhile, the Yankton Sioux Treaty of 1858 permitted the President to discontinue annuity payments to any Indians who "fail to make reasonable and satisfactory efforts to advance and improve their condition," and delegated to the Secretary of the Interior authority to impose the same penalty on families who refused to send children to school.[15]

The threat to withhold annuities revealed a basic tribal weakness. From the 1790's, treaties generally specified that the United States would compensate the tribes for land cessions in yearly installments. Not only did individual tribal members sometimes come to depend on their share of such payments for cash income, the tribal governments themselves usually subsisted on annuity income rather than impose taxes. Federal officials could routinely pay or withhold annuities for purposes of influencing tribal decisions. Conflicts over the use of funds owned or paid by the United States became a source of tribal factionalism.

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[10] The Kansas Indians, 5 Wallace, p. 756.
[11] *Yellow Beaver v. Commissioners of Miami County,* 5 Wallace p. 758.
[12] Kappler, 1904 : p. 729.
[13] Ibid., p. 798.
[14] Ibid., p. 986.
[15] Ibid., pp. 777–778.

THE END OF TREATYMAKING

The House of Representatives, in a rider to the appropriation bill of 1871, secured the Senate's concurrence to abolishing the treaty system. Supporters of the rider took the position that the treatymaking powers of the President and Senate could not bind the House to appropriate money. Debate on this proposition broadened into a general discussion of the policy of making treaties with Indian tribes. These debates are of interest because they reveal how far the lawmakers had removed themselves from the conciliatory impulses of Knox, Washington, and Jefferson.

Representative Aaron A. Sargent of California ridiculed the "so-called" treaties with the 38 men, women and children who constituted the "great nation of Umpquas," and the 238 Rogue Rivers, whose "chiefs" had to be appointed by the Commissioners in order that the tribe have representatives who could sign a treaty. Declaimed Sargent: "We pay tribute to these Indians not to make war upon us, not to murder our citizens * * *. Yet they are simply the wards of the Government, to whom we furnish the means of existence, and not independent nations with whom we are to treat as our equals * * *. Has not the comedy of 'treaties,' 'potentates,' 'nations,' been played long enough?"[16]

In the Senate, William Stewart of Nevada supported his fellow westerner's admonitions: "I regard all these Indian treaties as a sham."[17] Stewart also repudiated appropriations for the tribes, and supported a measure to allot all the tribal lands in what is now Oklahoma. Stewart's ideas and even his language echoed the Jacksonian rhetoric of the removal period. He regarded Indian chiefs as corrupt aristocrats and allotment as the key to civilization. When every Indian becomes a homesteader, he argued, "you can break up this aristocracy, break up these swindling treaties, and let these Indians have their present annuites on the proceeds of these lands."[18] In other words reminiscent of Jackson's first message on Indian removal, Stewart intoned: "The idea of thirty or forty thousand men owning in common what will furnish homes for five or ten millions of American citizens, cannot be tolerated."[19]

Stewart's opponents argued that abolishing the treaty system would prove "the first step in a great scheme of spoilation in which the Indians will be plundered" of their land.[20] They held that Congress could not amend the Constitution unilaterally by limiting the treatymaking power of the Executive. Nearly all the 'friends' of the Indian concurred, however, in representing most of the tribes as diminishing in significant number.[21] They merely affirmed that the United States had an historically established obligation to grant protection to the vanishing Americans.

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[16] 41 Cong., 3d sess., Congressional Globe, p. 743.
[17] Ibid., p. 1112.
[18] Ibid., p. 1578.
[19] Ibid., p. 1758.
[20] Ibid. p. 1825.
[21] Ibid., p. 1822.

In the end, Congress did not repudiate the treaties then pending ratification. Instead, a conference committee of both Houses agreed to an amendment to the appropriation bill which affirmed: "that hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[22] Thus ended the treaty system. Henceforth, instruments negotiated between the Executive and tribal representatives would be known as "Executive Agreements." In the immediate situation, the abolition of the treaty system reflected the reluctance of the House to appropriate money for projects agreed upon in treaties ratified exclusively by the Senate. In the context of contemporary trends in Indian policy, the abolition of the treaty system reflected the increasing suppression of the sovereign political status of the tribes, and signalized an era in which the United States was to deal with Indian groups unilaterally, by legislation, and with Indian persons not as citizens of their own nations but as wards of the United States Government.

THE SUBVERSION OF TRIBAL VALUES

The development of United States policy toward the tribes in the first century of independence reflected two variables: changing market conditions that rendered direct control of Indian land and mineral resources more profitable than trade in the goods Indians might extract or produce; and the changing balance of military power as the United States gained in numbers and wealth while the tribesmen lost their erstwhile French, English, and Spanish allies. The reduction of the status of the tribes from independent sovereigns to domestic dependent nations, and finally to wards of the government, reflects these basic changes.

The official ideology of Federal-Indian policy reflected humanitarian aims. Almost universally, those in charge of Indian affairs assumed that Anglo-American civilization represented a higher level of cultural and moral development and a more viable economic system than tribal cultures might encompass. Federal agents therefore regard their "civilizing" mission as a humane one.

Through treaty provisions and independent appropriations, the United States supported schools, supplied iron, hoes, ploughs, spinning wheels, and instructions in an effort to help Indians become independent, literate farmers or spinners, and practitioners of monogamy, Christianity, and pecuniary accumulation. Federal officials conceived this noble effort as complementary to the aim of transferring the major part of tribal resources to United States citizens. Industrious farmers need less land than hunters.

As it worked out in practice, the "civilization" policy wholly disregarded the values and the strengths of Indian cultures. Furthermore, the measures undertaken to civilize Indians either served the overall objective of depriving them of their land, or, where the goals of the policy did not fit the objective, the goals were subordinated. The clearest instance of such subordination can be found in the story of the Cherokees. In the 1820's, that tribe established a peaceful, thriving, self-sustaining community whose governing elite actively promoted constitutionalism, commercial farming, education, and Christianity. The United States virtually denied the abundant evidence of Cherokee success, deliberately assaulted the administrative integrity of the Cherokee government, and fostered enduring tribal factions—all in a successful effort to secure a treaty of cession for tribal lands in Appalachia.

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[22] Ibid., p. 1821.

Few tribes in the nineteenth century went as far as the Cherokees in trying to accommodate to the Government's notion of civilization. But nearly all received their education for civilization in the context of an overall plan of action that deprived them of their most valuable resources, displaced them from their homes, attacked and subverted their chosen leaders, and denigrated their religious and ceremonial life, family relations, dress, language, and sexual division of labor.

By replacing land with cash payments for land forever lost, by making tribal governments dependent on uncertain and frequently inadequate congressional appropriations, by attacking traditional authorities and subverting native leaders who were not compliant, Federal agents deprived the tribes of the economic, cultural, and political resources for building or sustaining viable independent communities. The agents, moreover, complained that their Indian wards had flunked the civilization test and failed to become decorously self-supporting citizens. The Government then proceeded to elaborate a policy for dealing with Indians as dependent paupers.

THE STRATEGY OF ASSIMILATION—POLICY DEVELOPMENT: 1821–1920*

When Congress in 1871 discontinued treatymaking with Indian tribes, United States Indian policy was determined unilaterally. This breach in the historic relationship permitted Congress to legislate rather than negotiate in Indian matters, often not even to consult, no matter what effect the legislation might have on the rights and lives of Indian people. For Indian tribes, only the judicial process remained as a defense or curb on the plenary powers of Congress. In the years ahead, the success or failure of policies legislated by Congress would depend upon the ability of the bureaucratic structure to manipulate Indian communities into compliance.

From its formal organization in 1824, the Indian Service has been vested with considerable powers and gained a reputation for inefficiency and corruption. Its personnel more often than not were ignorant of the people they were supposed to assist and protect. Congress might determine policy, but its results were brought to fruition by the Indian Service. Only to the extent that Congress kept a close watch and demanded accountability was it able to insure that its purposes would be carried out at the agency or community level. Unfortunately for Congress and Indians alike, Indian Service employees were not always both honest and able.

Although top pay for Indian agency positions in the 1870's was only $1,500 per annum, there was never any shortage of aspiring agents. Perhaps, the attraction lay in the commonly held belief that a few years in the Indian field opened vistas of opportunity for anyone with an acquisitive spirit. At any rate, the means used to defraud Indians and the Federal Government ranged from outright theft to shabby ventures just within the letter of the law. One clever agent in the Southwest developed mining enterprises, using tribal funds, and succeeded in recruiting an Indian Office inspector and the son of the Commissioner of Indian Affairs in his promising but illegal business venture. Another stocked the ranches of his friends with cattle issued for tribal use.[23]

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Honest mismanagement occurred as frequently, with just as damaging results. Indian farms were established where drought and grasshopper invasions were seasonal. Sawmills were built on reservations where the only timber was cottonwood and willow. Agency buildings and homes were often constructed out of green timber and promptly warped into unusable structures. Bakeries were set up at agencies, even though the patrons did not use or buy the products.

Such blundering and outright theft occasioned calls in the Congress for reform in the administration of Indian Affairs, but prior to the Civil War, interest in justice for the Indian was limited to a few souls along the eastern seaboard. Typical of the attitude of most westerners was the comment of an Iowan that Indians "are as worthless as so many tamed wolves."

EARLY REFORM EFFORTS

In the immediate post-Civil War years, the American public was in no mood to launch new crusades. But the frightful reports of bloody incidents like the massacre of Indians at Sand Creek in Colorado, and the misery and suffering of tribes shuttled from location to location, stirred public opinion and kept the so-called Indian problem before the Nation.

A few days before the Nation celebrated its centennial in Philadelphia General Custer and his troops died at the Little Bighorn. Public reaction was instant but not unanimous in calls for revenge, suggesting that the American conscience was awakening, if slowly, to the moral question posed by the Nation's treatment of native people.

Certain eastern seaboard cities soon emerged as the center of agitation for the rights of Indians, even if local eastern tribes went ignored. In the early 1880's, Helen Hunt Jackson, a Bostonian, published her famous book, "A Century of Dishonor," which recited the wrongs inflicted upon Indian tribes. This book was followed by her novel, "Ramona," based on the story of California Indians caught up in the atrocities consequent upon the discovery of gold.

Damned by her critics for lack of balance in reciting the history of Indian-white relations, Helen Hunt Jackson nevertheless called American morality into question. She publicized the Indian cause as it had never been publicized before and through the power of her writing enlisted numerous Americans in the movement to reform Indian affairs.

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[23] Hagan, William T., 1961, "American Indians," Chicago: The University of Chicago Press, p. 126.

A fundamental tenet of the reform philosophy of the period was belief that as long as Indians remained Indians the injustices of the past and present would continue. For their own and the Nation's best interest, it was argued, Indians had to be made over, willingly or if necessary by force, into Christian farmers and homemakers. Indian policy should be aimed at removing the barriers to a civilization and putting Indian people on an equal footing with their white neighbors. Then and only then would Indians as individuals assimilate into American life and, with the Nation's moral obligation met, the Federal Government could dispense with protection of Indian land and life.

EDUCATION AS A TOOL OF POLICY

Even before Congress responded with specific legislation to implement the goals of the reformers, the education of Indian children had shifted from a voluntary to a forced acculturation basis. In part this shift occurred as a result of the extreme dependence in which the Plains tribes found themselves once their hunting and gathering economy was destroyed. Cut off from their primary source of subsistence, the great buffalo herds, the Government either had to feed the people or let them starve. Having adopted the principle that it was easier to feed than fight the western tribes, the Government soon began to use this leverage to force the Plains tribes towards subsistence farming. Slowly, the dictatorial powers of the agents were broadened into other areas of reservation life, reinforced by the creation of Indian police forces and Indian courts. Refusal to send children to school became one of the many punishable offenses which brought the agent or his representative to Indian doorsteps.

Prior to the Civil War, the education of Indian children was limited to half-hearted attempts to fulfill treaty obligations. Most of the funds appropriated for education went into so-called model farms, mills, and salaries for sundry agency employees. A few Christian groups subcontracted these moneys and helped some tribes, like the Cherokee and Creek, to establish model school systems.

In most tribal communities, however, little progress in formal education had been made since the first appropriation of funds was authorized in 1819. The average agency school was usually staffed by the agent's wife and only accidentally with anyone competent in the field. This condition prevailed until the 1870's, when education emerged as a significant feature of Indian policy.[24]

In those early years, most Indian children attended schools in their home communities. Persuasion was used to encourage attendance and the course of study varied little from that available in non-Indian frontier communities. In 1879, however, a school was founded which attracted national attention and greatly influenced the direction of Indian education for many years. The school was Carlisle Indian Training School in Pennsylvania and its founder was Richard H. Pratt, captain in the United States Army.

The novelty of Carlisle lay in the educational philosophy of its founder. Pratt's ideas about educating Indians were simple enough. Older Indians, he argued, were beyond salvation. But the young, if separated from the influence of home and tribe, forced to give up their native tongue and culture, immersed in the habits and beliefs of white Americans, and taught useful trades and skills, could become functioning, self-reliant adults like other Americans. Carlisle became the model for Indian education and in succeeding years schools on and off the reservation adopted Pratt's philosophy.

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[24] Hagan, op. cit., p. 134.

In the early and harshest years, the boarding schools took Indian children from their parents, and through educational and work experiences marked by heavy discipline, tried to detribalize Indian youngsters while preparing them for a future away from the Indian community.

The effects of boarding school experience upon the Indian students ranged from frustration to psychological destruction. Even when the harsher feature of the system underwent modification in later years, more youngsters emerged from the experience as psychological casualties of American good intentions than as functioning, self-reliant adults, as was intended by the educational policies.

Intervention into the parent-child relationship further undermined Indian family life, already weakened by the transition from older lifestyle to reservation existence. In time, Indian communities came to view education with great suspicion and hostility—seeing it as a threat to the Indian community.

Perhaps most unfortunate of all, tribal groups which had previously accepted formal education and made great strides in providing academic training for their young people, saw their efforts thwarted by the educational bureaucracy established by the Federal Government. The Cherokee and other tribes, whose locally run and controlled school systems produced astute leaders and a highly literate population, were forced to turn their schools and children over to Federal control.

At the time, of course, Indian educators did not see their efforts in the light provided by later historical perspective. They fell in with the prevailing wisdom of the times, which was to eradicate Indian cultural influences and to prepare their young people to live like white Americans. Inner turmoil, confusion, frustration, and other manifestations of psychological stress were only indications that the youngsters were making progress in casting off their "savage" backgrounds and habits of mind.

ASSIMILATION BY COERCION

In education, as well as in other aspects of Indian life, reformers and policymakers envisioned a "savagery" that was regarded as the greatest barrier to Indian assimilation or civilization. With the enemy in clear focus, policies soon arose to change Indian landholding patterns and undermine and suppress Indian political and cultural institutions.

In earlier times, when a frontier separated white settlement and Indian country, tribal autonomy was possible and the internal affairs of the tribes were handled by custom and tradition. But the concept of Indian country, where tribal authority and law prevailed, was destined, like the frontier, to fall victim to the growth and development of the Nation.

In 1885, as a result of the much publicized *Ex Parte Crow Dog* decision of the U.S. Supreme Court upholding tribal law, Congress passed the Major Crimes Act, extending Federal criminal jurisdiction to Indian country for the crimes listed in the legislation. In later years, through amendments to the original legislation and other statutes, tribal sovereignty was further curtailed. Eventually, the Federal Government extended its jurisdiction in civil matters as well and promoted legislation bypassing tribal authority altogether.

The Indian system of common land ownership had never been understood or accepted by the American people. Europe and western civilization had grown to greatness on a system of private property in land, and most Americans reasoned it must, therefore, be a proper system for any people.

At various times from the earliest days of settlement, the idea of individualizing Indian landholding was suggested and even incorporated into some treaties. Thomas McKenney, the first Commissioner of Indian Affairs, in requesting funds from Congress to support Indian schools, proposed that as Indian youth "are qualified to enter upon a course of civilized life, sections of land be given them." [25]

After the Civil War, western settlement gathered enormous momentum. Favorable land laws, immigrants from abroad, and the construction of roads and railways westward resulted in demands to reduce Indian landholdings and to move tribes out of the way of western settlement.

By the 1880's, westerners and eastern reformers both agreed that too much land had been set aside for Indian use. Indians were not making proper use of the lands they owned and were keeping decent, hardworking folk from making farms and ranches. Eastern reformers convinced themselves that Indian salvation lay in private property and its "civilizing effect". The more Indian people knew about white culture, they pointed out, the less they would need in the way of resources and governmental protection. Eager to profit from Indian lands, railroad developers and land speculators lent their support to any proposals to reduce the size of Indian reservations.

All these pressures, in their individual and combined effect, resulted in Congress exploring ways to reduce Indian landholdings while forcing Indians to develop their lands and become a part of American society. The device by which this would be accomplished was an act of Congress in 1887, called the General Allotment Act or the Dawes Act, after the name of its major sponsor in Congress, Senator Henry Dawes of Massachusetts.

The Dawes Act was neither proposed nor justified as a legal means of separating Indians from their land. Rather, the Act was rationalized, oftentimes with great passion, as responsible government policy, designed to give Indians the protection and assistance long denied them in American society. Advocacy for the legislation came from leading public figures, from religious and civil bodies, and from Indian welfare organizations chartered to promote and protect Indian rights. Less vocal, though no less active in promoting the legislation, were railroad, mining and industrial interests.

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[25] McNickle, D'Arcy 1973, "Native American Tribalism," rev. ed., New York: Oxford University Press, p. 80.

The Act had its opponents as well. Senator Teller of Colorado responded to the introduction of an earlier version of the Act as "a bill to despoil Indians of their land and to make them vagabonds on the face of the Earth." But supporters of the idea eventually prevailed and the Act was signed into law by President Cleveland in June of 1887.[26]

To those who called themselves friends of the Indian, the Dawes Act seemed to provide a formula for what they had long been urging as a solution to the Indian problem—a means to turn Indians away from their past while easing their acceptance into American society. But, as time would prove, they underestimated both the land-greed of their fellow countrymen and the hold that traditional beliefs and practices had on Native Americans.

LAND ALLOTMENT—DISASTER IN THE MAKING

The essential features of the Dawes Act were: (1) the President was authorized to divide tribal lands and assign or allot 160 acres to each family head, 80 acres to single persons over 18 and orphans, and 40 acres to each other single person under 18. (2) Each Indian was supposed to choose his own allotment, but if he refused or failed to do so, a Government agent would make the selection. (3) Title to the land was to be held in Federal trust for 25 years or longer, at the President's discretion. (4) At the end of the trust period, U.S. citizenship would be conferred upon all allottees and upon other Indians who separated themselves from their tribe and took up "the habits of civilized life." (5) Surplus land remaining after allotment might be sold to the United States.

That the allotment policy was a mistake was apparent shortly after its authorization. The effect of the legislation was almost exactly what its critics anticipated—it became an efficient device for separating Indians from their land and pauperizing them. Reservation after reservation was surveyed and allotted, even where insufficient rainfall made farming a precarious enterprise at best. So-called surplus lands, often at the behest and sometimes as a result of the coercion of Indian Service officials, was sold without tribal consent to the Federal Government and opened to white settlement. Funds from the sale of these lands were held in the U.S. Treasury and used by the Government to purchase farm and ranch equipment and supplies, provide education and welfare and sundry other purposes which, in many cases, were to have been provided under treaties still in effect between the tribes and the United States.

When Indians particularly in the Plains States resisted the effort to convert them into farmers on their allotted acres, Congress amended the Dawes Act to permit the leasing of lands not being farmed or grazed. Enterprising white farmers and ranchers took advantage of the allottees who might not be aware of the worth of their lands and negotiated leases at ridiculously low prices. This action prompted another layer of bureaucratic control to regulate and oversee Indian land leasing procedures.

The Burke Act of 1906 further amended the Dawes Act to permit the Secretary of Interior to bypass the trust period restrictions and issue

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[26] Ibid., p. 81.

"certificates of competency" to Indians declared by him to be "competent". As soon as the amendment became law, anxious creditors and land buyers were on hand to help allottees make out applications and prepare the necessary affidavits, showing competency in land matters and evidence of habits of civilized life. And when the certificates were issued, the same creditors and land-buyers were on hand to purchase the land from the Indian owners.

In this way and through other devices in the law, the best of Indian land passed into white ownership. First to be lost were agricultural and grasslands, virgin timber acreage, and land with potential water and mineral resources. As William T. Hagan has observed: "Severalty may not have civilized the Indian, but it definitely corrupted most the white men who had any contact with it." [27]

In 1887, Indian tribes collectively owned about 140 million acres of land. The Dawes Act as amended in succeeding years set up the mechanisms whereby some 90 million acres passed into white ownership before the policy was abandoned some 45 years later.

SEARCH FOR SALVATION

Unfortunately for Indians, loss of land was not the only burden they faced. Accompanying the severalty legislation were assimilation policies designed to destroy tribal life and culture. Indian religions, ceremonies, and other cultural actvities were outlawed and suppressed. In time, Federal intervention touched every aspect of Indian life, from forcing Indians to abide by non-Indian marriage customs to tribal visiting practices and even the age of those who could participate in tribal dances.

Little wonder that when word began to spread about an Indian messiah, called Wovoka, and about a religion promising salvation from the white man, many Indians were eager to learn more. From delegations sent to the homelands of the prophet in Nevada and by word of mouth, the message came that in the near future a great cataclysm would destroy white America, the buffalo and other animals would return to the land, and Indians who practiced the new religion, the Ghost Dance, would be free to return to ways of their ancestors.

The Plains tribes, especially the Teton-Dakota, quickly converted Wovoka's message into a Ghost Dance religion of their own. The spread of the dance, especially among the more traditional members of the tribe, or the "recent hostiles" as Indian agents preferred to call them, alarmed Washington as well as neighboring white communities.

If Indian officials had taken the time to find out more about the Ghost Dance religion, one of the most tragic events in the history of Indian-white relations might have been avoided. The religion itself posed no serious threat to white settlers and, eventually, like other faiths based on prophecies of doom, would have lost converts or modified its doctrines.

Out of fear and by resorting to military intervention, Indian Service personnel precipitated a series of events which led to the tragic massacre of Indian men, women, and children at Wounded Knee,

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[27] Hagan, op. cit., p. 134.

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South Dakota in December 1890. Congress later awarded Congressional Medals of Honor to 22 of the soldiers who took part in the massacre, but public reaction then, as well as much later, expressed greater shame than pride.

Charles Alexander Eastman, the Sioux doctor and author, was the resident physician at the Pine Ridge Agency when the Wounded Knee Massacre took place. Military and Indian Service officials kept him from the massacre site for several days and when he was able to go, the sight of frozen, grotesque bodies greeted him. While he gave medical aid to the survivors, mostly babies protected by their mothers' bodies from gunfire, a detail of troops dug a huge trench, gathered the frozen bodies, and dumped them into a mass grave.

Eastman left the Indian Service shortly thereafter. The efforts he had made to adjust medical practices to the cultural traditions of the Pine Ridge people died with his departure. Although the Indian Service desperately needed men of Eastman's caliber to improve health conditions at Pine Ridge and other reservations in the country, little effort was made to keep him in the Indian Service.

In every part of Indian country, tuberculosis remained the greatest killer of Indians, with infant deaths from dysentery following a close second. Trachoma affected most of the reservation populations in the Southwest, and diabetes was emerging as an affliction of peculiarly high incidence among Indian populations.

In appropriating funds for Indian Affairs, Congress considered Indian health care a low priority. Not Indian health, but Indian progress in civilization most concerned Indian policymakers.

Indian opposition to the assimilation policies never disappeared completely. But every time Indians found an answer to the policies, the bureaucracy found a way around it. The Cherokee and other so-called Civilized Tribes in Indian Territory, now Oklahoma, resisted the allotment policy in vain, and then under the provisions of the law tried to reserve their surplus lands for the use of future generations. Congress, at the insistence of the Bureau, passed the Curtiss Act which dissolved the governments of the Five Civilized Tribes and proceeded to negotiate with compliant tribal members for the sale of the surplus lands.[28]

By the close of the 19th Century, Indian economic and psychological resources were both badly eroded. On most reservations, Indian leadership was a thing of the past with older leaders either dead, imprisoned, or in sullen retreat from tribal affairs. Although traditions and languages were being quietly passed on to future generations away from the watchful eyes of agents and missionaries, Indian cultural traditions were on the decline. Older familial and clan practices had been greatly disrupted and no longer held sway among some groups. An economy based upon land rental fees, seasonal labor, and occasional handouts from the Government and private charities came to characterize reservation life.

Tribal groups especially in the Southwest who had managed to escape allotment fared as badly as allotted tribes. Their reservations happened to be located in areas which even white Americans spurned. Some of these reservations proved later to be valuable for their mineral and other natural resources, but the absence of development funds rendered the resources useless and the people experienced starvation conditions and chronic malnutrition. A few of these reservations were so isolated that the Indian Service provided only minimum supervision, in the expectation that in time the inhabitants would die off anyway in accordance with the popular myth of the Vanishing Americans.

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[28] Spicer, Edward H., 1969, A Short History of the Indians of the United States, New York : D. Van Nostrand Reinhold Co., p. 76.

Although the period from 1900 to World War I is known as the Progressive Era in American history, little of the concern of American progressives about the quality and direction of American life spilled over into Indian affairs. The problems of urban and industrial life absorbed the attention of the Nation and the only time most Americans thought about Indians at all was when they appeared in the wild west show or as in the case of Jim Thorpe, emerged as an Olympic champion.

For most older and recent Americans, Indians were understood as a vanishing people who wore feathers and beads and lived in teepees and gallantly but foolishly resisted the march of western civilization and progress.

But whatever white Americans thought about Indians, the Indian Office remained enthusiastic about the future. As former Commissioner of Indian Affairs Francis E. Leupp reflected on the Indian situation in 1919, he observed: "The Indian problem has not reached a stage where its solution is almost wholly a matter of administration."[29] Many years would pass before anyone, save Indians, would believe that Indians could be better off as members of tribal societies than as prototype of white Americans.

The Right To Choose—A Policy for the Future*

By the 1920's it should have become apparent that for most of the preceding one hundred years the Nation had proceeded from false assumptions in administering Indian Affairs.

The critical assumptions were: (1) the Native American racial stock lacked biological vigor and would succumb to invading diseases and abusive use of alcohol; and (2) the Indian way of life could not compete with the more aggressive, more "rational," ways of the dominant society and must yield to it. In either case, the Indians would cease to exist as a political or cultural component in the developing nation. Policy based on such assumptions in the beginning generated no concern for the well-being of the original inhabitants, but was directed to speeding up the process of dissolution. A kind of death-bed watch resulted.

As a consequence of this negativism, the Indian population declined, seeming to bear out the prophesy of biological deficiency. By the close of last century, three-fourths of the natives inhabiting the area comprising the United States in pre-Columbian times had disappeared. Some tribes were totally gone. Other tribes, like the Mandans of the upper Missouri and the Jicarilla Apaches of northern New Mexico, seemed headed for extinction. Health conditions were wretched, with killer diseases like tuberculosis decimating the generations. Life expectancy ratios were shockingly low.

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[29] Hagan, op. cit. p. 147.

*Prepared by D'Arcy McNickle, Center for the History of the American Indian, The Newberry Library, Chicago.

A professional field nurse engaged by the American Red Cross to investigate health conditions on Indian reservations in 1921 reported that on seven reservations, all in the Southwest, the Indian birth rate was "26 per cent higher and (the) average death rate 163 per cent higher than that for the United States" in the same registration area.[30]

Programs of education were poorly funded and were staffed by poorly trained and poorly motivated teachers and administrators. The inefficiency of these early schools worked to the Indian advantage, although that was not intended. The educational philosophy was designed to destroy the Indian community, and, if the schools had been more effective in achieving that goal, Indian life might have deteriorated more rapidly.

The greatest threat to Indian survival resulted from the land policy imposed by the General Allotment Act of 1887, which in the years following its enactment reduced Indian land holdings in total disregard of future Indian needs.[31] The damage was not confined to a shrinking land base, however; Indian social organization, belief systems, and moral vigor were all related to land, to a universe defined by myth and ritual.

In brief summary: The preceding 100 years had wrought incalculable damage to Indians, their property, and their societies. Tribes had been moved about like livestock until, in some cases, the original homeland was no more than a legend in the minds of old men and women. Children had been removed from the family, by force at times, and kept in close custody until they lost their mother tongue and all knowledge of who they were, while parents often did not know where the children had been taken or whether they even lived. Tribal religious practices, when they were not proscribed outright, were treated as obscenities. Land losses, as noted, were catastrophic, while the failure of Government to provide economic tools and training for proper land use left the remaining holdings untenable or leased to white farmers at starvation rates. The bureaucratic structure had penetrated the entire fabric of Indian life, usurping the tribal decisionmaking function, demeaning local leadership, obtruding into the family—and yet was totally oblivious of its inadequacies and its inhumanity.

STIRRINGS OF CONSCIENCE

The failures of the Federal Government as trustee had become so notorious by the 1920's as to compel public action. The Pueblo Lands Board Act of 1924 [32] and the Osage Guardianship Act of 1925 [33] gave notice of a new mood in Congress. Both Acts came about in response to public outcry against intolerable exploitation of Indian resources. This was followed by a more general demand for reform, which in 1926 led President Coolidge's Secretary of the Interior, Hubert Work, to request the privately endowed Institute for Government Research (later the Brookings Institution) to investigate the conditions of

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[30] Senate Committee on Indian Affairs, hearings, 1929, Survey of Conditions of the Indians in the United States, pt. 3, p. 935.

[31] See pt. 2, p. 11, supra.

[32] 43 Stat. 636.

[33] 43 Stat. 1008.

Indian life. The investigation resulted in the report of Lewis Meriam and Associates, entitled "The Problem of Indian Administration," published in 1928.

For the first time in the long history of Indian affairs administration, the performance of the Government was brought under scrutiny by a body of competent, professional students of public affairs. The findings of that survey are widely known and only these highlights are mentioned here:

> The income of the typical Indian family was low * * * Only 2 per cent of the Indians had incomes of over $500 a year. Partly as a result of this poverty the health of the Indians in comparison with the rest of the population was bad. The death rate and infant mortality were high. Tuberculosis and trachoma were extremely prevalent. Living and housing conditions were appalling; diet was poor; sanitary provisions were generally lacking. The system of public health administration and relief work was inadequate. The educational system had no well considered broad educational policy. A uniform curriculum was being applied throughout the Indian school system, although the different tribes were at quite different stages of development. Indian children were being fed at reservation schools on an average expenditure of 11 cents a day per child, and were being forced to do heavy domestic work actually to ease the financial burden but ostensibly to acquire training in useful industrial arts.[34]

The Preston-Engle report on Indian irrigation, also commissioned by Secretary Hubert Work and published in 1928, revealed how inadequately the Government had dealt with Indian water rights, a basic tribal resource. Significantly, the report recommended: "That the principle promulgated in the *Winters* decision be invoked and enforced with respect to all those reservations where necessary to secure an adequate water supply for Indian lands."[35]

The report also recommended that where use rights had been established adverse to Indian water rights, the Government should "provide an adequate water supply for the Indians in question, either by purchase of valid rights, or the construction of storage reservoirs * * * such purchase of rights or storage reservoir construction to be paid for out of gratuity appropriations." The purpose of such a recommendation was to give effect to the *Winters* decision of 1908, in which the Supreme Court upheld the right of a tribe to make maximum beneficial use of the waters needed to irrigate reservation lands.

The failure to act fully on these recommendations after almost 50 years has left Indian water rights still in jeopardy and has increased greatly the cost of effecting an equitable adjustment.

The 70th Congress (1927–29) set up its own investigative procedure, adopting Senate Resolution 79 which authorized a special subcommittee to conduct hearings and gather information. In succeeding years, the Senate accumulated a vast archive of material dealing with Indian reservations and the relationship between Indians and the Federal Government.

TRIBAL REORGANIZATION

The growing demand for reform resulted in the adoption of the Indian Reorganization Act of 1934, the first major legislation in this field since the enactment of the General Allotment Act. That earlier legislation was based on the premise that the individualizing of tribal land would expedite the process of transforming a tribal people into competitive, taxpaying, free citizens, in repudiation of their own values and traditions. The Indian Reorganization Act, in contrast, was designed to restore some measure of the resource base and the self-governance which tribes had enjoyed prior to 1887.

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[34] Library of Congress Legislative Reference Service, 1945, Aspects of Indian Policy, p. 29.

[35] Survey of Conditions, 1930, op. cit., pt. 6, p. 2213.

Of the Allotment law the Meriam report had observed: "It almost seems as if the government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction. Individual ownership has in many instances permitted Indians to sell their allotment and to live for a time on the unearned income resulting from the sale." [36] The report could have added that by the 1920's more than 100,000 Indians were landless.

Certain essential features of the Indian Reorganization Act were left on the drawing board as that legislation took its course through committee hearings. The excised articles were central to the reform design and their elimination postponed the day when Indians might assume control over their affairs. Of particular importance were the following:

(1) The power "To compel the transfer from the community for inefficiency in Office or other cause, of any employee of the Federal Indian Service locally assigned." [37]

(2) "The Secretary of the Interior may from time to time delegate to any Indian community, within the limits of its competence as defined by charter, the authority to perform any act, service, or function which the United States administers for the benefit of Indians.[38]

(3) "The Commissioner is authorized and directed to make suitable provision for the training of Indian members * * * in the various services now entrusted to the Office of Indian Affairs * * * including education, public health work and other social services, the administration of law and order, the management of forests and grazing lands, the keeping of financial accounts, statistical records, and other public reports, and the construction and maintenance of buildings, roads, and other public works.[39]

(4) "It is hereby declared to be the purpose and policy of Congress to promote the study of Indian civilization and preserve and develop the special cultural contributions and achievements of such civilization, including Indian arts, crafts, skills, and traditions. The Commissioner is directed to prepare curricula for Indian schools adapted to the needs and capacities of Indian students, including courses in Indian history, Indian arts and crafts, the social and economic problems of the Indian, and the history and problems of the Indian administration.[40]

(5) "There shall be a United States Court of Indian Affairs, which shall consist of a chief judge and six associate judges * * * appointed by President, by and with the advice and consent of the Senate."

The court would have original jurisdiction in specified cases, including "actions at law or suits in equity wherein the pleadings raise a substantial question concerning the validity or application of any federal law, or any regulation or charter authorized by such law, relating to the affairs or jurisdiction of any Indian tribe or chartered community."

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[36] Meriam Lewis, et al., 1928, The Problem of Indian Administration, Baltimore: The Johns Hopkins Press, p. 7.

[37] U.S. House of Representatives Committee on Indian Affairs, hearings on H.R. 7902, 1934 title I, sec. 4–h.

[38] Ibid., title I, sec. 7.

[39] Ibid., title I, sec. 1.

[40] Ibid., title II, sec. 2.

"The final judgment of the Court of Indian Affairs shall be subject to review on questions of law in the circuit court of appeals of the circuit in which such judgment is rendered * * * subject to review by the Supreme Court." [41]

By eliminating items 1 and 2, the continuance of bureaucratic control was assured in personnel assignments and resource development.

By denying Indians the special training authorized in item 3, Indian leadership found itself handicapped in dealing with management problems; while the failure to reorient school curricula as directed in item 4 allowed the schools to continue as alien institutions within the Indian community. Some 30 years would go by before Indian studies programs began to be offered, first at major universities across the country, and then in schools taken over and managed by Indian communities.

By failing to establish a Federal Indian court with appellate procedures, the administration of law and order on Indian reservations continued to be dominated by the Interior Department and subject to the Department's budget limitations. Failure of the Department to provide adequately for public safety induced some tribes to request State jurisdiction over civil and criminal matters. This request from the Indians of a few States was cited as justification for the adoption of Public Law 280 in the 83d Congress, authorizing any State to assume jurisdiction over an Indian reservation without consulting the wishes of the Indians. And because courts of Indian offenses created under the department's law and order code lacked adequate provision for appeal and review of trial court decisions, Indians were brought under the Civil Rights Act of 1968.[42]

This action again was a case of some Indians expressing dissatisfaction with a system created by the Federal Government, in response to which the Congress curtailed further the right of self-government. Some tribes previously had incorporated bills of rights in their written constitutions; all tribes could have done so in time, as and when they felt the need.

A REVERSING TIDE

By the 1930's it had become evident that the Indians would not vanish; indeed, the surprising fact was that the rate of net increase for the enumerated Indian population exceeded the growth rate of the general population. Between the years 1900 and 1950 the number of Indians increased by some 70 percent by the end of that period the rate of increase for the Indian population was 22 per 1,000, compared with a rate of 15 per 1,000 for the Nation.[43] The Navajo tribe increased five-fold during the 60-year period 1870–1930.

Survival was not in numbers alone. What came to be realized, reluctantly at times, was that Indian custom and tradition, Indian languages, Indian belief systems, Indian ways of rearing children, the

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[41] Ibid., title IV, secs. 1 and 3(5), and sec. 15 cited.
[42] 25 U.S.C., title II.
[43] Hadley, J. Nixon, 1957, The Demography of the American Indians, Philadelphia: The Annals, American Academy of Political and Social Science, vol. 311, p. 29.

Indian style of living in extended families, Indian sharing, all still prevailed. For the administrator, the educator, and the missionary worker this adherence to Indian ways seemed perverse and intolerable. On occasion it resulted in an intensified effort to obliterate the Indian past, as when Indian Commissioner Charles Burke, in 1923, instructed his field officers to require: (1) That Indian dances be limited to one each month in the daylight hours, in midweek, and at only one center in each district (except that during planting and harvesting no dances were to be allowed); (2) that no individuals under the age of 50 take part as dancers or as spectators and (3) that the field employees carry on an educational campaign against the dances.[44]

The Meriam report made passing reference to "native ceremonies, such as celebrations, dances, games, and races," and found that such activities "tend to disappear under the general influence of white culture, or to take on the form of a spectacle and become commercialized, thus losing much of their original significance in group life." [45]

In offering this observation the survey staff reflected the conventional wisdom of the period, which still held to the belief that Indian identity and tradition could not remain separate and distinct within the general society. The ultimate fate of the Indian people, according to this view, was assimilation into American Society.

This view, in fact, went unchallenged through the first half of the century; it was the basis of law and public policy. Meanwhile, evidence was accumulating that would seriously question these assumptions. While Indians in increasing numbers found employment in urban centers, especially after World War II, a relatively small percentage took up permanent residence in the city. A pattern of commuting between the reservation and the city began to emerge. Even highly skilled industrial workers, such as the Indians employed in "high steel" work on bridges and skyscrapers, remained closely attached to an Indian community. Intertribal and regional organizations came into existence, and Indians found themselves discussing shared problems and experience. This was a new development, since with only a few exceptions tribes had no tradition of forming permanent alliances. Tribal ceremonies, of both ritual and social nature, attracted growing numbers, and individuals and families traveled to distant reservations to observe or to participate in local performances. A phenomenon referred to as the "pow-wow circuit" began to flourish. Ceremonies that had not been performed for many years, were revived. The growth of the Native American Church after the 1930 accelerated.[46] Tribal groups presumed to have been exterminated in the early years of settlement in the east and southeast, were rediscovered, often bearing a cryptic name and claiming Indian heritage, and moreover their numbers were increasing.[47]

SOCIAL SERVICE FINDINGS

Factors such as these were discussed and evaluated at a conference sponsored by the Wenner-Gren Foundation at the University of Chicago in the winter of 1954. The conference was chaired by John Provinse, formerly Assistant Commissioner of Indian Affairs, and the 20 participants were mainly social scientists, who had devoted their professional careers to the study of Indian communities or to administrative duties related to such communities. The stated purpose of the conference "was not to evaluate administrative policies and practices but to examine objectively those assumptions of fact or value, expressed or implied, which are held by the general American public, by Congress, and by the Executive, and which appear to guide the present handling of Indian affairs." [48]

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[44] McNickle, op. cit., pp. 73–74.

[45] Meriam, op. cit., p. 629.

[46] Aberle, David F., 1966. The Peyote Religion Among the Navajo, New York: Viking Fund Publications in Anthropology, No. 42, pp. 17–20.

[47] Berry, Brewton, 1963, Almost White, New York: The Macmillan Co., pp. 1–51.

A number of assumptions then current were examined against the collective experience of the participating conferees, and all agreed that the one assumption basic on national policy was the idea that "assimilation of the American Indian into the normal stream of American life is inevitable, that Indian tribes and communities would disappear." [49]

The discussants found themselves in "complete agreement" that the assumption and the policy that followed from it were unwarranted. They noted: "Most Indian groups in the United States, after more than 100 years of Euro-American contact and in spite of strong external pressures * * * have not yet become assimilated in the sense of loss of community identity and the full acceptance of American habits of thought and conduct * * *. The urge to retain tribal identity is strong, and operates powerfully for many Indian groups." [50]

While recognizing that Indian society would continue to change, making adaptations to social and environmental pressures, also that some individual Indians would choose to abandon tribal life, the conferees agreed that "despite external pressures, and internal change, most of the present identifiable Indian groups residing on reservations (areas long known to them as homelands) will continue indefinitely as distinct social units, preserving their basic values, personality, and Indian way of life, while making continual adjustments, often superficial in nature, to the political and economic demands of the larger society."

To the above observation, the conferees added a cautionary note: "Forced, or coercive, assimilation is self-defeating in practice, tending to antagonize and drive underground in the Indian groups those leaders who might otherwise develop constructive and cooperative attitudes toward greater acceptance of non-Indian society. * * * Meanwhile, the current practice of telling Indians that their assimilation is inevitable is probably more deterrent than contributory to adjustive changes, since it gives rise to feelings of anxiety and resistance that lead to rejection of new ideas and institutions." [51]

The discussions were not devoted exclusively to assumptions on which Government policy was based; assumptions commonly held by Indians were also reported to the conference. Typical of Indian views reported were these: "Over the years, the Indian can expect no consistency in policies regarding him. No matter what policy is today, tomorrow it will be different—even opposite."

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[48] Provinse, John (ed.) 1954, The American Indian in Transition, American Anthropologist, vol. 56, No. 3, p. 387.

[49] Ibid., p. 388.

[50] Ibid., p. 388.

[51] Ibid., p. 389.

And: "The interests of the dominant society will take precedence over the interests of Indians in any policy decision; Indian interests will be considered only when they coincide with or at least do not contradict 'white' interests." [52]

These sentiments, when they are reviewed 20-odd years later, are remarkably contemporary.

IGNORING THE EVIDENCE

This 1954 conference occurred at the very time that the 83d Congress was holding hearings and adopting legislation for the purpose of terminating Federal responsibility and compelling Indian tribes to accept assimilation as the ultimate resolution of a long historic process.

As the evidence for Indian survival accumulated, obviously refuting the 19th century predictions, the Federal establishment found itself unprepared to meet the challenge. The fact that past policies had failed to achieve their stated objectives was taken as a failure of management, not of basic purpose. When critical voices were raised denouncing government performance, response took two forms: (1) studies and investigations were carried out; and (2) followed by new or amended legislation.

A case in point was the Meriam Survey of 1926–28, initiated in response to critical attacks during the early 1920's. This survey was followed by the Indian Reorganization Act and other reform legislation of the 1930's. It is relevant to note that the Meriam report was entitled "The Problem of Indian Administration," and that the thrust of the report was centered on recommended improvements in the delivery of services to the Indian people. The underlying philosophy of Indian affairs administration was not questioned. The report specifically stated: "Since the great majority of the Indians are ultimately to merge into the general population, [administration] should cover the transitional period and should endeavor to instruct Indians in the utilization of the services provided by public and quasi-public agencies for the people at large in exercising the privileges of citizenship and in making their contribution in service and in taxes for the maintenance of the government." [53]

The same investigate-legislate pattern was followed at later critical junctures, again without questioning the motives or the ultimate purpose of Government policy. After World War II, for example, a growing concern was voiced, in and out of Congress, over the increasing complexity and cost of government. In response to this expressed anxiety, the Congress in 1947 created the Commission on Organization of the Executive Branch of the Government, of which former President Herbert Hoover was named chairman. The Commission appointed a special task force to look into the administration of Indian affairs, with a Princeton University professor of political science, George Graham, serving as chairman. Graham had no knowledge of Indian life and no more than a briefing in Indian history, and the recommendations advanced by his task force gave no evidence that the subject matter had been explored in depth. The task force advocated "progressive measures to integrate the Indians into the rest of the population as the best solution of the 'Indian problem.' In the opinion of the Commission this policy should be the keystone of the organization and of the activities of the Federal Government in the field of Indian affairs." [54]

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[52] Ibid., pp. 393–94.
[53] Meriam, op. cit., p. 22.

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As a device for speeding up the "integration" of Indians in the general population, the Commission further proposed that programs for Indian welfare be "progressively transferred" to State governments and that the Bureau itself be buried in the Federal Security Agency, or its successor.

Significantly, Dean Acheson, Vice Chairman of the Commission, dissented, observing: "Recollections of the painful history which surrounds the cases of *The Cherokee Nation* v. *The State of Georgia* [55] and *Worcester* v. *Georgia* [56] make a novice in this field pause before endorsing a recommendation to assimilate the Indian and to turn him, his culture, and his means of livelihood over to State control."

Acheson was joined in this dissent by James H. Rowe, Jr., and James Forrestal, members of the Commission.

STUDIES IN FUTILITY

Legislation did not result immediately from these recommendations, but the work of the Hoover Commission gave impetus to the drive to reduce Federal responsibility for Indian survival. The Booz, Allen, and Hamilton report, contracted for by the Department of the Interior and published in 1950, viewed Indian affairs as comparable to problems encountered in industrial management. It contributed nothing to an understanding of cultural adjustment, since, like previous studies, it concerned itself primarily with ways to extricate the Federal Government from its treaty and statutory obligations. This report, issued in four volumes, almost succeeded in avoiding any mention of Indians, the putative subject matter.[57]

Both the Hoover Commission and the Booz, Allen, and Hamilton reports encouraged the notion that the Government should abandon as expeditiously as possible its historic role as trustee and advocate for the Indian people. Thus the termination legislation of the 83d Congress that dominated the Indian scene from the mid-1950's until well into the next decade, had its ideological base in superficial surveys conducted by unqualified investigators.

A more serious defect was the failure of these surveys to take notice of the wrongful assumptions upon which policy had been based. Nowhere in these official reports is any reference made to the evidence for Indian survival in numbers and in cultural identity. Program failures resulting in Indian poverty, poor health, wretched housing, educational deficiencies—all the ills recited 20 years earlier in the Meriam survey—were attributed to failures of execution. The report writers seemed unprepared, or unwilling, to recognize that program failure was symptomatic of a basic misconception of the Government-Indian relationship. In their preoccupation with cleansing the Government of responsibility, they failed to notice that the death watch policy of an earlier time was no longer acceptable in a national society becoming concerned about the civil rights of individuals and groups.

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[54] Graham, George (ed.) 1949 Commission on the Organization of the Executive Branch of the Government—Indian Affairs (Hoover Commission), A Report to the Congress, Washington, D.C.: U.S. Government Printing Office.

[55] 5 Peters 1.

[56] 6 Peters 534.

[57] Booz, Allen, and Hamilton, 1950, Management Review and Appraisal: System, Organization and Management Practices, Washington, D.C.: Bureau of Indian Affairs.

INDIANS BECOME INVOLVED

The concerted drive during the Eisenhower administration to terminate Federal responsibility alerted Indian leaders throughout the country of the fact that their property and their civil rights had been placed in jeopardy by a badly advised bureaucracy. This growing alarm among Native Americans accounts for the unprecedented demonstrations that erupted in the mid-1960's, culminating in such spectacular forays as the occupation of the Washington headquarters of the Bureau of Indian Affairs and the takeover of the Wounded Knee community in South Dakota. The protests, moreover, could not be dismissed as transient anger, but marked the beginning of Indian involvement in the process of policy formulation. While the Federal establishment might be unprepared to deal with the mounting evidence of Indian survival and continued to promote ideas that prevailed in the 19th century, a new tribal leadership emerged to challenge those ideas.

The Federal agencies established in the 1960's to deal with problems of poverty and community decay encouraged this emerging leadership and assisted Indian reservations in developing their own planning and action programs. Of particular importance were the changes in attitude and operating procedures that came with the new agencies. With no hardened regulations dictating action and no traditional policies to defend, it was possible for them to serve in an advisory capacity and to give priority to Indian decisionmaking; they had no commitment to a strategy of assimilating the Indian people into white, urban society.

In the course of a survey conducted by the Department of Labor to determine the impact on the Indian population of its various manpower programs, the reporting team commented:

> We grew to admire the Indians tremendously as a group, to marvel at their courage and dignity even in the midst of abject poverty, and to appreciate their lack of aggressive acquisitiveness. Even their reserve appeared to be the symbol of an inner strength as well as an insulation against the deteriorating influence of white society * * *. We realized what a tremendous loss to mankind would be the obliteration of this culture, call the obliteration process what one will—assimilation, acculturation, or termination. We became strong partisans of the belief that the Indians should be encouraged and helped to preserve their culture.[58]

Such sentiment was a refreshing new note in the long history of Government-Indian relations and seemed to promise that a better attitude might come to prevail.

NEW PROGRAMS—NEW GOALS

The outstanding innovation of the period was the establishment of Indian Community Action Programs (ICAP), which brought to reservation communities technical services and financial assistance for which tribes in the past had always been dependent on the Bureau of Indian Affairs. The Office of Economic Opportunity which administered the new program invited tribal officials to prepare and submit plans for local projects. Once a plan was approved, OEO contracted with the tribal organization to operate the project, and it advanced the budgeted funds. This transferral of authority and responsibility for decisionmaking to the local community was an administrative device which the Bureau, after more than 100 years of stewardship, had failed to employ, excusing its failure by alleging the incompetence or inexperience of Indian leadership. What the Bureau did not recognize, or did not acknowledge, was that Indian tribes were asking to be allowed to choose whether to continue in a state of dependency or to exercise such sovereign powers as were theirs to assert. The Bureau in the 1960's still had not adapted its thinking to the evidence of Indian survival and the Indian drive for self-determination.

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[58] U.S. Congress, Joint Economic Committee, 1969, Toward Economic Development for Native American Communities, vol. 2, p. 389, Washington, D.C.: Government Printing Office.

The manner in which the Rough Rock community on the Navajo Reservation in Arizona assumed responsibility for the education of its children exemplified the new direction in Indian affairs. A new school plant had just been completed by the Bureau when the Office of Economic Opportunity proposed that the Navajo community assume control of the school through a school board to be appointed by the community. The OEO agreed to provide developmental funds, if the BIA would make available to the community the operating funds which it had already budgeted for that purpose.

The shift in educational goals and methods which resulted from this agreement was of more importance than the actual transfer of authority, though that was significant in itself. For the first time an Indian community, not the professional people recruited from the outside, became responsible for the success or failure of a school. As a consequence of the shift in control, the school could contribute to the development of the community by providing learning opportunities for adults as well as children. Because it was now part of the community, the school became involved in the normal process by which children are integrated into the adult world; it was no longer an alien institution depriving the adult world of a national increment of functioning members. By teaching English as a second language, the child could acquire a basic competency in his native language before venturing into a foreign mode of speech, and the school became less threatening.[59]

This development at Rough Rock had an explosive effect all through the Indian country. Tribal delegations from as far away as Canada visited the site and listened to the all-Navajo school board members talk about educational goals and philosophies—and on their return to their home communities many of these tribal leaders began actions that would lead to control of the education of their children. Within a few years, tribes or communities in several States and in Canada established their own school boards and assumed the management of local schools. In a movement paralleling these efforts, Indian community colleges were organized and staffed with Indian teachers and administrators.

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[59] U.S. Senate, Committee on Labor and Public Welfare, hearings, 1969, Indian Education, pt. 1, pp. 12–25, Washington D.C.: U.S. Government Printing Office.

By the 1960's still another development marked the changing time. Indians were enrolling in colleges and universities in unprecedented numbers, and going on to graduate and professional schools. Moreover, the major universities and many State institutions found it necessary to install special programs, or to expand traditional offerings, to accommodate this new student body. A survey conducted in 1974 by the Western Interstate Commission on Higher Education reported that 100 institutions of higher learning, located in 23 States, were offering course work designed to meet the interests of Indian students, and in that year a total of 13,300 were enrolled in college work. Of this total number, 9,438 were undergraduates, 535 were in graduate school, and 3,347 were in special (nondegree) programs.[60]

This was a different kind of student body, as the institutions recognized in their curriculum changes. The Indian students entered college training, not primarily as a means of achieving material success in the white man's competitive society, but to acquire the knowledge and skills needed to bring about improved living conditions at home, to protect their position as a sovereign people, and to define acceptable goals for themselves and their tribes. They talked about "education for Indian purposes", and they were concerned that "self-determination", as the term was used in the 1970's, should have substance and meaning.

The term received wide public attention when it was employed in Presidential messages to Congress relating to the conduct of Indian affairs. President Johnson in 1968 declared: "We must affirm the right of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination." [61]

In 1970, President Nixon denounced the termination policy of the Eisenhower administration—making no mention of his position in that administration—and declared:

> This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community * * *. There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal Government. Nor should they lose Federal money because they reject Federal control.[62]

These declarations, at the highest level of government, acknowledged for the first time what Indians have always wanted: The right to make choices; the right to decide, as individuals and as tribes, how to adapt to the modes of the general society without destroying the values they cherish. When this right of decision prevails, some individuals may opt for making themselves over to conform with another lifestyle; some tribes may abandon traditional patterns in favor of new goals and new ideals. But unless such a climate of free choice exists, change will be resisted, and coercive change will only repeat the antagonisms and failures of the past.

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[60] Locke, Patricia (ed.), 1974. A Survey of College and University Programs for American Indians. Boulder, Colo.: Western Interstate Commission for Higher Education.

[61] Presidential Documents, Weekly Compilation of, 1968, vol. IV, No. 10, Washington, D.C., U.S. Government Printing Office.

[62] Message from the President of the United States, 1970, Recommendations for Indian Policy, Washington, D.C.: U.S. Government Printing Office.

CONGRESSIONAL ACKNOWLEDGMENT

Congress has now moved to give legal sanction to the principle of free choice with the enactment of the Indian Self-Determination and Education Assistance Act.[63] Laws are not self-fulfilling, however, and while the language is reassuring, the manner in which the 1975 Act is administered will determine its effectiveness. If the administrators proceed from the assumption that the Indian people have no future as Indians and that assimilation and the loss of identity are inevitable, the explicit intent of Congress will be subverted. National policy will continue to be what it has been in the past—a strategy of manipulating tribal leadership into compliance, with the usual result of discrediting the leadership.

The Self-Determination Act is of particular promise because it provides a formula for dealing with what has always been a major obstacle to the transfer of power from the bureaucracy to the Indian community. The Secretary of the Interior as the Federal official accountable for Indian trust property, has never been willing or legally able to reduce his responsibility as trustee. A principal criticism leveled at the Indian Reorganization Act arose from the failure to confront that issue. The Act required that tribal constitutions and charters be approved by the Secretary, as well as tribal actions affecting trust property, tribal membership, or any matters relating to Federal trusteeship. The tribal contracting arrangement authorized by the Self-Determination Act, if constructively administered, can lead the way to effective and purposeful tribal government.

INDIAN READINESS

What could be the decisive factor in determining national Indian policy is the state of readiness of the Indian population. Many negative conditions still prevail: Educational levels are still much too low; the delivery of health services is grossly inadequate; wretched housing breeds health problems and social ills; unemployment rates greatly exceed local and national averages; the affirmation of water rights remains clouded, and meantime the pressure to reduce or to confiscate available water continues to grow; resource development languishes.

In spite of these crippling handicaps, remarkable advances have been made. As already indicated, Indians have entered academic and professional training in unprecedented numbers. Indian lawyers are now in practice, many of them specializing in the intricacies of Indian case law. The number of trained physicians and nurses has increased to the point of warranting the formation of professional associations. Administrative and supervisory positions in a number of school systems are manned by Indians. Indian artists, writers, poets, musicians, scientists, and engineers have established national reputations. Indian tribes are writing their histories and organizing libraries and archival depositories. Where native languages were falling into disuse, special study courses have been initiated and several tribes are compiling their own dictionaries. Culture centers are operating at many reservations, encouraging a renaissance in traditional arts, music, dances, myth and legend, costumemaking, even cookery.

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[63] 88 Stat. 2203, 1975 ed.

What is most remarkable about these developments is that they intensify and make explicit the boundaries of Indian identity. Native America before the coming of Europeans was a land of many separate peoples, with their separate languages, histories, traditions, and manner of adapting to the physical environment. Each tribe, or band, or camp was a self-contained entity organized in varying patterns of social structure. Such a population of separate and closed systems was easy prey for invading forces employing divide and conquer tactics.

What is now happening, after 400 years of Indian-white contact, is a coalescing of Native Americans into something approaching a sense of national identity. Indians have become aware of their common problems and common peril, and they are learning how power is used in contemporary society. Tribal boundaries are not likely to disappear, but increasingly Indians can be expected to act in common cause.

National Indian policy of the future must take into account that Indians will survive, as individuals and as communities; they will grow in numbers, and they will insist on freedom of choice. That insistence, it should be recognized, is of the same quality of mind and spirit that made possible the growth of the free peoples of the world.

CHAPTER TWO

CONTEMPORARY INDIAN CONDITIONS

Today, available statistics on Indians in the United States continue to paint a picture of widespread deprivation unequalled by any other United States subgroup. Whether men or women, living in the city or country, Indians in the United States suffer from inadequate education and relatively poor health, low incomes, poor housing and sanitary conditions generally regarded as unacceptable.

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CHAPTER TWO

CONTEMPORARY CONDITIONS

[This chapter is based on the work of Mr. Stephen A. Langone and Mr. Richard S. Jones, Government Division, Congressional Research Service, Library of Congress]

INTRODUCTION

Who exactly are American Indians? Where do they live? Are there Indians that do not live on reservations? Are there Indians in cities? Are there Indians that live outside the Western United States? How much do they earn, where do they work, what is their educational and health status?

To answer these questions, the Commission has assembled demographics on the Indian population in the United States. The picture that emerges is sometimes shocking, sometimes upsetting to preconceived notions, and often depressing. This picture, although incomplete, is a basis for preliminary action.

LACK OF RELIABLE STATISTICS

Reliable statistics on Indian affairs that could be the basis for charting conditions, planning programs, and measuring progress do not exist. The reasons for this inadequacy range from the simplest to the most complex. The basic reason is that there is no clear-cut, generally accepted definition of "an Indian". Without this basic definition, the development of further statistical descriptions is very difficult. Defining the problems of various categories of Indians (urban, rural, women, men) becomes a complex task, particularly at census time when some Indians are not identified or contacted to fill out census forms or are not familiar enough with English to do so.

The task is made more difficult by the fragmentation of jurisdiction over the people who are classified as "Indians." Health services, agricultural and other developmental assistance, business loans, housing aid, land development, and other programs, though all directed to Indians, are handled by different Federal agencies with widely dissimilar interpretations of eligibility criteria.

This results in a diffusion, not only of effort, but of information. Data that would yield statistics reflecting the Indian condition are scattered among many Federal agencies, with far-reaching and unfortunate results. Not only are data difficult to obtain, but they are often incomplete, or unrepresentative. Worse still, the task frequently is not undertaken at all because of the tremendous difficulty of implementation.

Ironically, this dearth of information is not for lack of interest or resources. The Bureau of Indian Affairs has expanded dramatically over the past 100 years, and congressional interest in the subject of

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Indian policy has increased as well. Studies, reports, and analyses flow out of Washington with great regularity. Yet the problem of coordination of material on a regular basis remains.

The number of Indians under Federal jurisdiction has risen from 290,000 to nearly 550,000 over the past 100 years. Yet, of approximately 18,000 reference cards on Indians in the Library of Congress, only 16 point to statistical information; only 11 can be found under the heading of census; and none deal with population or income.

Other sources also yield little valuable information. For example, 100 years ago the annual report of the Commissioner of Indian Affairs was a 619-page book summarizing policy decisions and situations at each field jurisdiction. It contained tables with information on population, education, agriculture, trust funds, trust land sales, and liabilities, in addition to miscellaneous reports.[1] In contrast, the most recent Commissioner's annual report contained 15 double-spaced pages, with only four statistical tables dealing with awards, budgets, funding, and income from leases.[2]

The Bureau of Indian Affairs publishes other reports dealing with land, reservation development, population, and labor force status. However, the information contained in these reports does not provide a comprehensive picture of the state of Indian affairs today.*

Indian affairs are a far more complex subject today than they were 100 years ago, although those early times are more easily documented. In 1869, the Bureau of Indian Affairs was budgeted at $7,042,923, numbered 400 employees and had jurisdiction over 289,778 Indians. In 1977, the Bureau had a budget of $590,510,000, a staff of 13,000 and 543,000 Indians in its service population.[3] Yet today there are no statistics available to document the status of Indians, their living conditions, and the effects of programs aimed at promoting their well-being.

This lack of solid statistical information also extends to other agencies assisting Indians. An additional $160 million or more is spent on Indian programs each year by 9 Federal agencies:

Economic Development Administration;
Small Business Administration;
Department of Housing and Urban Development;
Farmers Home Administration;
Rural Electrification Administration;
Forest Service;
Bureau of Sport Fisheries and Wildlife;
U.S. Geological Survey;
Department of Labor.

Even with all these agencies, and even with all these funds, there is no continuous statistical information on the condition of the American

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*See Appendix B, Bibliography of Materials used by the Commission for a list of these publications.

[1] U.S. Bureau of Indian Affairs. Report of the Commissioner of Indian Affairs made to the Secretary of the Interior for the year 1869. Washington, 1870. 619 pp.

[2] U.S. Bureau of Indian Affairs, Indian Affairs 1968: A Progress Report from the Commissioner of Indian Affairs, Washington, 1969. 15 pp. The BIA has not published a formal annual report as such since 1968 (Source: Letter from the Executive Secretary, U.S. Department of the Interior, Office of the Secretary, Sept. 9, 1976).

[3] BIA, Estimates of Resident Indian Population and Labor Status: by State and Reservation: March 1973 (released June 1973), 19 pp. BIA, Office of Indian Education Programs, Statistics Concerning Indian Education, Fiscal Year 1975, 49 pp. BIA, Office of Trust Responsibilities, Annual Report of Indian Land as of June 30, 1975, 66 pp.

Indian. Though Census Bureau statistics exist, and are the basis for facts currently known and accepted about Indians, they are often based on other Federal records. These other Federal records usually do not extend to all persons of Indian ancestry, but only to those individuals served by the Bureau of Indian Affairs.

WHO IS AN INDIAN?

The Federal Government, State governments and the Census Bureau all have different criteria for defining "Indians" for statistical purposes, and even Federal criteria are not consistent among Federal agencies. For example, a State desiring financial aid to assist Indian education receives that aid only for the number of people with one-quarter or more Indian blood. For preference in hiring, enrollment records from a federally recognized tribe are required. Under regulations on law and order, anyone "of Indian descent" is counted an Indian.

If Federal criteria are inconsistent, State guidelines for deciding who is or is not an Indian are even more chaotic. In the course of preparing this report, the Commission contacted several States with large Indian populations to determine their criteria. Two States accept the individual's own determination. Four accept individuals as Indian if they were "recognized in the community" as Native Americans. Five use residence on a reservation as a criteria. One requires one-quarter Indian blood and still another uses the Census Bureau definition that Indians are those who say they are.

If simply defining who is an Indian presents problems, compiling other vital statistics about Indians and Indian affairs presents almost insurmountable obstacles.

INDIANS ARE EVERYWHERE

Population figures have played an historic role in clarifying the effects both planned Indian programs and accidental circumstances have had on Indian people. Through many periods of Federal policy, figures demonstrating Indian death rates have often stirred public attention to Indian policy and popular concern for Indian needs. In the twentieth century, the increase in Indian population has been viewed as an indication of improving conditions on Indian reservations; in the long historical view, however, this recent trend has been late in developing. Indian population numbers show an impressive gain since the end of the last century when 256,000 Indians were reported for the area now comprising the United States. For this same area it had been estimated that the Pre-Columbian population was approximately 890,000, and so it appears that today's Indian count has recovered most or all of the losses reported over the previous 450 years. That, however, may turn out to have been a completely erroneous conclusion. The work of recent scholars in this field suggests that the Pre-Columbian population for the area north of Mexico (what is now the United States, Canada and Greenland) may have numbered between 10 and 12 million. If this revised calculation can be substantiated (it is now undergoing vigorous examination), it will clearly demonstrate the devastating effects of invading diseases and methods of warfare.

Today, available statistics on Indians in the United States continue to paint a picture of widespread deprivation unequalled by any other United States subgroup. Whether men or women, living in the city or country, Indians in the United States suffer from inadequate education and relatively poor health, low incomes, poor housing, and sanitary conditions generally regarded as unacceptable.

These conditions, of course, can be measured only among those defined as Indians. The figures used here are taken primarily from the 1970 Census Bureau records and are based on the number of people who identified themselves as Indians.

According to these files, there are 792,730 Indians, or Native Americans, living in every State of the Union and the District of Columbia, an increase of 122 percent since 1950.[4] Many people familiar with Indian issues consider the Census figure to be low and a figure of one million is generally considered more accurate. Vermont has the lowest Indian population (229) of all the States, even though more than 25 percent of all Indians live in the Northeast, and more than half live outside Western States. North Carolina, for example, is the State with the fifth-largest Indian population (44,406) in the country.

Within the United States, a minority of 28 percent of all Indians live on reservations that range in size from the 15.4-million-acre Navajo reservation with approximately 125,000 tribal members located in the Southwest to the one-quarter-acre Golden Hill Reservation in Connecticut with six citizens. A total of 289 tribes and bands live on 268 "federally recognized" reservations or otherwise defined "trust areas" in 26 States. Nine "State-recognized" reservations in New York and one in Texas receive some Federal assistance.[5] Two additional tribes are recognized in a limited fashion.[6] In addition, there are 24 State Indian reservations,[7] and 219 Native Alaskan villages or reservations, and even some urban reservations such as Agua Caliente in Palm Springs, Calif.

However, State and Federal reservation statistics do not tell the whole story. An estimated 32,000 Indians exist without either Federal or State recognition. Some belong to tribes that were never recognized by the Federal Government, others to tribes whose Federal status was "terminated" by legislation during the 1950's and early 1960's. These tribes, or communities, are scattered across the United States and include the Mohegan Community in Connecticut, the Montauk Community on Long Island, the Narragansett Community in Rhode Island, the Houma Community of Louisiana, the Yacqui Indians of Arizona and others.[8]

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[4] In 1960 the figure was 523,591; in 1900, 237,196. The 1970 census does not include 34,538 Eskimos and Aleuts among the total Indian count. (See U.S. Dept. of Health, Education, and Welfare, A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census; vol. III, American Indians, July 1974, pp. 8, 18.)

[5] Ch. 2, Legal Concepts and ch. 6, Social Services, address this issue. These are the Alleghany, Cattaraugus, Oil Springs, Onondaga, Poospatuck, Shinnecock, St. Regis Mohawk, Tonawanda, and Tuscarora in New York and the Alabama-Coushatta in Texas.

[6] These are the Lumbees in North Carolina and the Tiguas in Texas. The Lumbees have neither a communal land base nor a traditional tribal government, while the Tiguas live on a 73-acre reservation held in trust by the State and receive services from the State.

[7] See U.S. Dept. of Commerce, Economic Development Administration, Federal and State Indian Reservations and Trust Areas, 1974. U.S. Government Printing Office, stock No. 0311-00076, 604 pp.

[8] See Theodore W. Taylor, The States and Their Indian Citizens, Bureau of Indian Affairs, 1972, pp. 226-32.

However, the largest percentage of Indians are members of neither reservations, nor communities but are urban residents.[8] More than 46 percent of all Indians (335,738) are city dwellers, double the number of 1960.[9] They may be members of a State or federally recognized tribe, a community without its own reservation or land, or members of a "terminated" tribe.[10] The largest number of urban Indians (23,908) live in the Los Angeles-Long Beach area, followed by Tulsa, Okla. (15,983), Oklahoma City (12,981), San Francisco-Oakland (12,041), and Phoenix (10,127). However, urban Indians are found in many large cities; Census Bureau data list 30 "SMSA's [11] with large Indian populations.

INDIAN POVERTY

No matter where Indians live, the pattern is essentially the same. Incomes are lower than that of the population at large, with more Indians below the poverty level.

INDIAN INCOME

	Income (percent)	Median income	Poverty levels [1] (percent)
All Indians, $4,000 a year	34	$5,832	33
U.S. population, $4,000 a year	15		
All Indians, $10,000 a year	22	9,590	11
U.S. population, $10,000 a year	47		

[1] These sections are based upon 1970 census data as presented in a Dept. of Health, Education, and Welfare report entitled "A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census" ; vol. III ; American Indians, July 1974, 100 pp. Cited above (Cf. footnote No. 1).

Statistics on health care are not quite as dismal.[12] Since the Indian Health Service began in 1955, mortality rates have declined, and life expectancy has increased. For example, between 1955 and 1971 the Indian infant death rate decreased 56 percent, and the maternal death rate by 54 percent. Deaths from tuberculosis, gastritis, and influenza/pneumonia declined 86, 88, and 57 percent respectively. Although life expectancy increased from 60 years in 1950 to 65.1 years in 1970, it remains the lowest of any U.S. population group.

Still, health care is a serious problem for the Indian population. The Indian death rate from accidents was three times the national average in 1971. So was the Indian mortality rate for cirrhosis of the liver, tuberculosis, and gastritis. Although death rates have decreased, certain diseases still disproportionately afflict Indian tribes. Between 1965 and 1971, the incidence of otitis media (a disease of the middle ear affecting balance) increased 74 percent. Strep throat and scarlet fever increased 218 percent and influenza by 242 percent.

SCHOOLING LOW AND UNEMPLOYMENT HIGH

Both Indian men and women suffer from inadequate and inappropriate education. They also suffer from unemployment and low income.

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[8] See ch. 9, Off-Reservation Indians for more information.

[9] See DHEW study, op. cit., p. 13.

[10] Taylor, op. cit.

[11] Standard Metropolitan Statistical Areas.

[12] Ibid., p. 58.

The following charts show the comparative educational levels of Indian men and women with their non-Indian counterparts.

EDUCATION—MEN (PERCENT)

	Indian men	U.S. population, men
Completing grade school	63.0	73.0
Completing high school	34.0	54.0
Completing college	3.5	12.6
Median (years)	10.5	12.1

EDUCATION—WOMEN (PERCENT)

	Indian women	U.S. population, women
Completing grade school	66.0	75.0
Completing high school	35.0	55.0
Completing college	2.5	7.8
Median (years)	10.5	12.1

Differences in educational levels often make themselves felt as Indians seek work. More Indians are in the ranks of the unemployed or the working poor, than members of the U.S. population at large. Very few make the $10,000 that is considered a living wage. The situation is highlighted by one statistic: 74 percent U.S. men are employed, while only 56 percent of Indian men are working. The unemployment rate of 11.6 percent for Indian men and 10.2 percent for Indian women is not a true reflection of unemployment since unemployment is determined by registering those seeking work. Obviously, on reservations with no jobs, many do not register and are not included in these unemployment statistics.

EMPLOYMENT—MEN

[In percent]

	Indian men	U.S. population, men
Unemployed	11.6	3.9
Employed	56.0	74.0
Earning $4,000 annually or less	55.0	31.0
Making $10,000 annually or more	8.5	25.2
Median income	$3,509	$6,614

Though Indian women are not as often unemployed as Indian men, they are often found in the ranks of the underemployed, or those earning $4,000 annually or less. Additionally, they are less likely to earn the $10,000 a year that is at least a beginning toward a living wage.

EMPLOYMENT—WOMEN

[In percent]

	Indian women	U.S. population, women
Unemployed	10.2	5.1
Employed	31.0	39.0
Making $4,000 annually or less	80.0	68.0
Making $10,000 annually or more	1.5	3.2
Median income	$1,697	$2,404

The conditions of poverty among Indians who live in rural areas are worse than the conditions of those residing in cities. This general poverty extends to housing, sanitation, and transportation as well. The comparison with other Americans is sharp:

[In percent]

	Housing (crowded)	Sanitation		Transportation
		Without water	Without toilets	
Rural Indians	14.0	67.4	48.0	31.5
Rural U.S. population	10.1	8.7	13.6	11.7

Rural Indian women face the most difficult lives of all being well below both urban women and rural and urban men, in education, income levels, and employment. In such families, 68 percent have incomes of $4,000 a year or less and only 4.3 percent have incomes of $10,000 or more annually. These income levels force these families to live in tragic misery.

	Education (median, years)	Employment (percent employed)	Income (median)
Rural Indian women	9.7	26	$1,356
Rural Indian men	9.4	56	2,749
Urban Indian women	11.4	38	2,023
Urban Indian men	11.5	65	4,658

STATISTICAL PROFILE

Overall, the picture that emerges from these statistics is a grim one. The fact that it probably is not completely accurate and certainly not up-to-date can only cause speculation as to how bad the problem is today. Nor is it possible to establish clearly if programs aimed at improving Indian lives are having any significant success.

Efficient planning and responsive execution of development programs must be based on accurate information on current economic and social conditions and on changes in these conditions over time. Despite increases in Federal expenditures for Indian programs from $7 million to approximately $1.5 billion over the past hundred years or so, statistics regarding these programs are more inadequate than ever.

The increasing neglect of Indian statistics has long been recognized by those interested in Indian affairs. As long ago as 1904, Charles J. Kappler, a staff member of the Senate Indian Affairs Committee, decried the general lack of information while compiling a four-volume publication, Indian Laws and Treaties. In the introduction to his first volume he states:

> An accurate compilation of the treaties, laws, executive orders, and other matters relating to Indian affairs, from the organization of the Government to the present time, has been urgently needed for many years, and its desirability has been repeatedly emphasized by the Commissioner of Indian Affairs in his annual reports to the Congress.[13]

When Kappler's four-volume compilation [14] was reprinted 46 years later, the House Interior Committee pointed out that it had:

> "* * * long recognized the need for gathering into one compilation all available important statistical information relative to the Indians under the committee jurisdiction and the law affecting such Indians.

This concern has been echoed by virtually every Congress since that time. Yet while concern and allocated funds and staff increase, the availability of reliable information does not. Statistics on unemployment, educational attainment, land in trust, income, health, and so forth are less available today than they were many years ago.

RECOMMENDATION

The Commission recommends that:

Congress requires the Assistant Secretary of Indian Affairs to provide a comprehensive annual report on Indian matters which will contain reliable, current, and accurate data.

The Secretary of Interior be directed to gather and maintain material for this report from all Government agencies serving Indians.

The report be organized to present facts relating to Indian treaties, agreements, and Executive orders; current land, population, tribal government, economic, health, welfare, education, and housing statistics in Indian communities; material relating to the use of natural resources on Indian land; and information on administration of all Indian programs. A sample format for this proposed report can be found in Appendix C.

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[13] Indian Affairs: Law and Treaties. 88th Cong., 2d sess. Senate Doc. No. 319.

[14] House, 81st Cong., 2d sess. Committee on Public Lands, Subcommittee on Indian Affairs, Compilation of Material Relating to the Indians of the United States and the Territory of Alaska, Including Certain Laws and Treaties Affecting Such Indians, June 13, 1950, serial No. 30, 1110 pp.

CHAPTER THREE

BASIC DOCTRINES OF AMERICAN INDIAN LAW

One of the most significant elements of Indian treaty law is that Indian treaties were not a grant of rights from the United States to the tribes, but rather a grant from the tribes to the United States.

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CHAPTER THREE

BASIC DOCTRINES OF AMERICAN INDIAN LAW

[This chapter was prepared for the Commission by Professor Charles F. Wilkinson, School of Law, University of Oregon]

INTRODUCTION

This Commission's charter from Congress, reflecting 200 years of legislative and executive action, aptly describes the relationship between the United States and American Indian tribes as "unique" and "special."[1] Such words have repeatedly been emphasized by the United States Supreme Court in opinions stretching across almost 1½ centuries.[2] Thus the unequivocal message from all three branches of our Federal Government is that Indian law and policy is a field unto itself.

It is almost always a mistake to seek answers to Indian legal issues by making analogies to seemingly similar fields. General notions of civil rights law and public land law, for example, simply fail to resolve many questions relating to American Indian tribes and individuals. This extraordinary body of law and policy holds its own answers, which are often wholly unexpected to those unfamiliar with it.

This chapter examines the root doctrines of the Federal-tribal relationship. Ultimately, these doctrines allocate legal and political power among three sets of governments—the tribes, the United States, and the States—on more than 50 million acres of Indian land. For better or worse, law plays an enormous role in the lives of American Indians—perhaps a greater role than is the case with any other group of American citizens. Because of that, the doctrines peculiar to Indian law will continue to play the same crucial role that they have played in the past; they will determine whether, and to what extent, American Indians will be able to control their own destinies.

TRIBAL SOVEREIGNTY: INDIAN TRIBES AS GOVERNMENTS

Sovereignty means the authority to govern, to exercise those powers necessary to maintain an orderly society. The powers of sovereign governments are familiar: the power to enact laws; the power to establish court systems; the power to require people to abide by established laws; the power to tax; the power to grant marriages and divorces; the power to provide for the adoption of children; the power to zone property; the power to regulate hunting and fishing; and so on. "Sov-

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[1] Public Law 93–580, Jan. 2, 1975, 88 Stat. 1910, as amended by Public Law 94–80, §§ 1–4, Aug. 9, 1975, 89 Stat. 415.

[2] See, e.g., *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Morton* v. *Mancari*, 417 U.S. 535 (1974).

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ereignty," therefore, is a collection of all or some of those powers which governments (such as the United States, States, counties, and cities) have and exercise on a regular basis.[3]

When we talk about tribal sovereignty, then, we are saying a very simple but deeply fundamental thing: Indian tribes are governments.

The status of Indian tribes as sovereigns, or governments, has been uniformly recognized by Congress and the courts from prerevolutionary days through the present. This sovereign status is reflected in the early treaties, the early cases, the recent cases, and the recent legislation. Since tribal sovereignty is a doctrine which has evolved and has been clarified over more than 200 years, it is helpful to trace the development of the doctrine.

The single most important court decision, which is still relied upon by courts, is *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). This case resulted from the struggle between the State of Georgia and the Cherokee Nation, whose lands became surrounded by the State of Georgia. In the late 1820's, Georgia passed a series of laws which effectively abolished the Cherokee government. One of the laws included a requirement that any non-Indian residing on Cherokee land must first obtain a permit from the Governor of Georgia. Two non-Indian missionaries resided on Cherokee land at the invitation of the tribe but without such a permit from the Governor. The Georgia courts convicted the missionaries of violating the State law, but the United States Supreme Court overturned that conviction.

Chief Justice John Marshall's opinion in *Worcester* v. *Georgia* struck down the Georgia State laws which purported to operate on Cherokee lands. Interpreting the treaties, the Constitution, and the Indian Trade and Intercourse Act, Chief Justice Marshall found that Indian tribes were "distinct, independent, political communities having territorial boundaries, within which their authority [of self-government] is exclusive * * *." Thus, the State laws could have no effect on Cherokee lands because the Cherokee Tribe was a separate sovereign government.

While the opinion in *Worcester* v. *Georgia* holds that Indian tribes are not subject to State law, later cases make it clear that Indian tribal sovereignty, or self-government, is subject to the superior legislative authority of Congress.[4] To put it another way, Georgia could not regulate affairs on the Cherokee reservation, but the United States could. The doctrine of tribal sovereignty, as first set forth in *Worcester* v. *Georgia*, has been explained in its most classic form by Felix Cohen, then Assistant Solicitor, Department of the Interior, a writer who is still considered by the courts to be the leading authority on Federal Indian law:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses * * * all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, * * * but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers

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[3] See generally F. Cohen, Handbook of Federal Indian Law 122–50 (U. N. Mex. ed. 1971) (hereinafter cited as "Cohen").

[4] Congress' plenary power over Indian affairs is discussed later in this chapter.

> of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[5]

The doctrine of tribal sovereignty, or self-government, remains the starting point for any current discussions concerning the powers of Indian tribes. An Indian tribe inherently possesses all powers held by a government. The tribe continues to hold these sovereign powers until they are expressly relinquished by the tribe, as in a treaty, or until they are expressly taken away by Congress.

Since *Worcester* v. *Georgia* in 1832, the Supreme Court has treated tribal sovereignty as an evolving doctrine. This evolution is not unusual; many provisions of our Constitution itself, including the Commerce Clause and the Bill of Rights, have also undergone great change during the same period. In the late 19th and early 20th centuries, the Supreme Court emphasized the plenary authority of Congress in relation to tribal sovereignty as Congress began to exercise its broad power to deal with Indian affairs.[6] In the latter part of the 19th century, the Court implicitly limited tribal sovereignty by finding that a crime committed by a non-Indian against a non-Indian on the reservation was wholly the concern of the States, not of the Federal Government.[7]

With passage of the Curtis Act of 1898 (30 Stat. 495) and the abolishment of the Indian Territory, tribal government lapsed into a period of dormancy. The policy trend toward destruction of tribal government was reversed in 1934 with passage of the Indian Reorganization Act (25 U.S.C. sec. 461–479). In 1959, in *Williams* v. *Lee*, 358 U.S. 217 (1959), the Supreme Court gave recognition to the continued strength of the doctrine of tribal sovereignty.

In the early 1960's, the Supreme Court itself seemed to be caught up in the termination era. Most particularly, *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962), set forth the previously unprecedented proposition that State laws would apply to Indians on the reservations, in spite of notions of tribal sovereignty, unless the State laws infringed upon tribal self-government or were prohibited by Federal law. This finding, which was not raised by the facts of the case and which has since been limited by the Supreme Court,[8] was a clear departure from earlier cases finding that reservation Indians were beyond the reach of State authority.

But the Supreme Court decisions of the 1970's have reemphasized the importance of tribal sovereignty. *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973), found that "the Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and Federal statutes must be read." Thus, Federal treaties and statutes must be "read with this tradition of sovereignty in mind." The Supreme Court then ruled that a reservation Indian is not subject to State income tax for income earned on the reservation. The Court restated most of the basic law of tribal sovereignty first established by Chief Justice Marshall in *Worcester* v. *Georgia:*

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[5] Cohen, supra note 3, at 123.

[6] *United States* v. *Kagama*, 118 U.S. 375 (1886); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

[7] *McBratney* v. *United States*, 104 U.S. 621 (1882); *Draper* v. *United States*, 164 U.S. 240 (1896). In this same time period, however, three decisions also affirmed the general taxing power of a tribe over persons and property within the geographical boundaries of the tribe. *Morris* v. *Hitchcock*, 24 App. D.C. 565 (1904), aff'd. 194 U.S. 384 (1904); *Maxey* v. *Wright*, 105 F. 1003 (8th Cir. 1900) aff'g per cur. 3 Ind. T. 243, 54 S.W. 807 (1900). *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), aff'g 82 S.W. 855 (1904), app. dism. 203 U.S. 599 (1906).

[8] *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 167–68, 172 n. 8, 176 n. 5, 180 n. 20 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148–49, 150 n. 15, 153 (1973).

> "[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history" * * * This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities having territorial boundaries, within which their authority is exclusive, and having a right to all the land within those boundaries, which is not only acknowledged, but guaranteed by the United States."

An even more recent case is *United States* v. *Mazurie*, 419 U.S. 544 (1975), which dealt with the right of tribal governments to exercise regulatory authority over non-Indians. The Wind River Tribes, acting pursuant to Federal statutes and with the approval of the Secretary of the Interior, passed a law requiring that sellers of alcoholic beverages must obtain liquor licenses from the tribe. This pattern of regulation is, of course, similar to regulation by State governments. A non-Indian was denied a liquor permit from the tribe. The operators of the liquor store continued to operate without a license and a Federal prosecution followed. The Tenth Circuit Court of Appeals ruled that the tribe had no power to regulate a liquor license because it was not a government. According to the appellate court, the tribe was nothing more than a "private, voluntary organization." The Supreme Court rejected that reasoning and upheld the requirement of a tribal license. Justice Rehnquist, writing for a unanimous Court, relied upon notions of tribal sovereignty and found that Indian tribes are "a good deal more than 'private voluntary organizations'":

> Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territories, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations * * *."

Thus, today's Supreme Court has made it clear that tribal sovereignty remains a vigorous and far-reaching doctrine. The absolute view of complete sovereignty, first set forth in *Worcester* v. *Georgia*, has been slightly eroded. Nonetheless, *Worcester* is repeatedly cited by the courts and the results consistently affirm sovereign tribal rights. The present law fully and unequivocally supports the conclusion that Indian tribes initially possess all elements of internal sovereignty and that their sovereign attributes can be diminished only by Congress, not by the States. These sovereign attributes include such basic governmental powers as the following:

1. The power to establish legislatures, usually called tribal councils.[9]
2. The power to establish tribal courts.[10]
3. The power to tax.[11]

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[9] See, e.g., *Williams* v. *Lee*, 358 U.S. 217 (1959); *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685 (1965).

[10] See, e.g., *Williams* v. *Lee, supra; Iron Crow* v. *Oglala Sioux Tribe*, 231 F. 2d 89 (8th cir. 1956).

[11] See, e.g., *Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th cir. 1958); *Buster* v. *Wright*, 135 F. 947 (8th cir. 1905), appeal dismissed 203 U.S. 599 (1906).

4. The power to grant marriages and divorces.[12]
5. The power to provide for adoptions and guardianships.[13]
6. The power to regulate hunting and fishing.[14]
7. The power to control economic development through zoning regulations and other land use planning devices.[15]
8. The power to regulate non-Indian individuals in Indian country.[16]

Other sovereign powers could be added to this list. The point, however, is not to enumerate all sovereign powers of Indian tribes, but simply to give examples for the purpose of showing that Indian tribes are in fact governments. Congress has the unquestioned power to limit those sovereign rights, but all inherent governmental powers remain intact until Congress expressly acts. The importance of strong tribal self-government has been manifested in all recent congressional legislation.[17]

The Trust Relationship: The United States' Special and Unique Relationship With Indians

The trust relationship between the United States and American Indians was first set forth in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831). This opinion, which was written by Chief Justice John Marshall, stands with *Worcester* v. *Georgia* as one of the most significant opinions in Indian law. The two cases retain their vitality today and are repeatedly cited by modern courts.

Cherokee Nation v. *Georgia* was handed down one year before the *Worcester* decision and also involved the Cherokee Nation's resistance to Georgia's attempts to enforce State law on Cherokee lands. The Cherokee Nation filed an action in the United States Supreme Court, seeking to enjoin enforcement of the State statutes which effectively outlawed the Cherokee government and laws. The Supreme Court refused to accept the case because the tribe was not a "foreign state" within the meaning of Article III of the Constitution. As a result, the Court did not have jurisdiction over the case.

Chief Justice Marshall, however, proceeded to discuss the legal status of Indian tribes and their relationship to the Federal Government. In doing so, he drew upon international law, colonial and United States treaties, Federal statutes, and the Constitution. The Chief Justice characterized the relationship between the two governments as "perhaps unlike that of any other two people in existence" and "marked by peculiar distinctions which exist nowhere else." Marshall agreed with the Cherokee Nation that it was a "state" in that it was "a distinct political society * * * capable of managing its own affairs and governing itself." But he found that the Cherokee Nation was not "foreign" because it was within the jurisdictional limits of the United States and because the treaties with the Cherokees acknowledged dependency upon the United States.

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[12] See, e.g., *United States* v. *Quiver*, 241 U.S. 602 (1916); *Cohen, supra* note 3, at 137–39.

[13] See, e.g., *Fisher* v. *District Court*, 424 U.S. 382 (1976); *Wakefield* v. *Little Light*, 276 Md. 333, 347 A. 2d 228 (1975).

[14] *Colville Tribe* v. *State of Washington*, 412 F. Supp. 651 (E.D. Wash. 1976); *Quechan Tribe* v. *Rowe*, 531 F. 2d 408 (9th cir. 1976).

[15] *Santa Rosa Band of Indians* v. *Kings Court*, 532 F. 2d 655 (9th cir. 1975), cert. granted; *Snohomish County* v. *Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P. 2d 22 (1967).

[16] See, e.g., *Oliphant* v. *Schlie*, 544 F. 2d 1007 (9th cir. 1976), cert. granted; *Quechan Tribe of Indians* v. *Rowe*, 531 F. 2d 408 (9th cir. 1976); *Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th cir. 1958); and *U.S.* v. *Blackfeet Tribal Court*, 244 F. Supp. 474 (D. Mont. 1965).

[17] Report of Task Force IX (vol. 1), p. 75. See also, *Bryan* v. *Itasca County*, — U.S. —, 96 S. Ct. 2102, 2101 n. 14 (1976).

Marshall concluded that Indian tribes, rather than being foreign states, "may, more correctly, perhaps, be denominated domestic dependent nations * * *." He then invoked the trust relationship by concluding that the relationship of the tribes to the United States "resembles that of a ward to his guardian."

This duty has always been recognized by the courts and has been variously characterized as a "fiduciary" relationship, a "trust" responsibility, and a "guardian-ward" relationship.[18] Marshall's analysis that our law has no direct parallel to this trust relationship has been often emphasized by the United States Supreme Court, which has described the relationship between Congress and Indians as "solemn," "unique" or "special," and "moral."[19] The Court, in utilizing such unusually forceful language, has relied in large part upon political principles which have emerged throughout the history of Indian Affairs. Although *Cherokee Nation* v. *Georgia* involved a treaty, later decisions have found that the trust relationship is created not only by treaty but also by other methods of Federal recognition such as statutes, agreements, and Executive orders.[20]

The trust relationship, like the Bill of Rights in the Constitution, cannot be defined with precision in all respects. It is an evolving, dynamic doctrine which has been expanded over the years as changing times have brought changing issues.[21] Nevertheless, the trust relationship is a mature doctrine about which several generalizations can fairly be made.

Indian trust title to land is one important manifestation of the trust relationship. Title to land in Indian country is held by the United States in trust for the tribe. Trust land is not subject to taxation, and individual Indians on trust land are free of State taxes.[22] Trust lands, and their resources, must be managed for the sole benefit of the tribe so that they will be preserved.[23] In some instances, land is held in trust by the United States for individual Indians.[24] Some tribal funds are also held in trust and, in some cases, funds are held in trust for individual Indians.[25]

Land held in trust for Indian tribes or individuals must be carefully distinguished from the so-called "public lands," such as those administered by the National Park Service, the Bureau of Land Management, and the Forest Service. Public lands are administered for the public-at-large. Different rules often apply for Indian trust lands which are held, and administered solely for, the affected Indians.[26]

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[18] See, e.g., *United States* v. *Mason*, 412 U.S. 391, 397 (1973); *Seminole Nation* v. *United States*, 316 U.S. 286, 296–97 (1942).

[19] See, e.g., *Morton* v. *Mancari*, 417 U.S. 535, 540, 552 (1974); *United States* v. *Sandoval*, 231 U.S. 28, 239 (1913); *Cherokee Nation* v. *Southern Kan. Ry.*, 135 U.S. 641, 654 (1890).

[20] Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213, 1214–15 (1975) (hereinafter cited as "Chambers").

[21] Chambers, supra note 20, pp. 1230–38.

[22] See, e.g., *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973); *Warren Trading Post* v. *State Tax Comm'n*, 380 U.S. 685 (1965); Israel & Smithson, Indian Taxation, Tribal Sovereignty and Economic Development, 49 N. Dak. L. Rev. 269 (1973).

[23] See generally, Chambers, supra note 20.

[24] 25 U.S.C. § 348.

[25] See, e.g., Cohen, supra note 3, pp. 97, 105–07, 113.

The scope of the trust responsibility extends beyond specific real or personal property which is held in trust. The United States has the obligation to provide related services, and to take other appropriate actions necessary to protect tribal self-government.[27] The doctrine may also include a duty to provide adequate social services to Indians.[28] These conclusions flow from the basic notion that the trust responsibility is a general obligation which is not limited to specific provisions in treaties, Executive orders, or statutes; once the trust relationship has been acknowledged, administrative action is governed by the same high duty which is imposed on a private trustee.[29]

The tribes have recourse in the courts if the trust responsibility is breached. For compensable claims arising before 1946, tribes are permitted to sue for money damages in the Indian Claims Commission.[30] For claims arising after that date, the proper court is the U.S. Court of Claims.[31] Many successful suits have been brought for loss of land and for mismanagement of timber, water, and mineral resources.

In addition, although the trust responsibility cannot be enforced in court against Congress itself, executive officials are subject to suits for injunctive and declaratory relief for breach of the trust duty.[32] A leading example is *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252. (D.D.C. 1972), where a Federal district court enjoined the Department of Interior from diverting water to a Federal project which reduced the water quality of Pyramid Lake in Nevada. Pyramid Lake is located on a downstream Indian reservation. The court held that the Government's trust responsibility to the tribe was violated by the upstream diversion, even though the diversion was not on the reservation. A leading writer on the trust relationship has emphasized the importance of this case in the development of the trust relationship:

> The case, therefore, imposes a duty of loyalty on Federal officials, and suggests that when actions or projects of Federal agencies conflict with the trust responsibility to Indians, the non-Indian Federal activity should be operated so as to avoid interference with Indian trust property.[33]

These principles clarify the crucial distinction between Congress and executive agencies in the administration of the trust responsibility. Although Congress is not subject to suit for violation of the trust responsibility, administrative officials are directly accountable to the tribes through court actions. Administrative agencies operate only pursuant to delegations of authority from Congress. Basic administrative law principles dictate that administrative officials are subject to judicial review for most situations in which they exceed their delegated authority.[34] Accordingly, Indian tribes and individuals will often have recourse against the Department of the Interior, or any other agency which violates the trust responsibility.

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[26] Cohen, supra note 3, p. 287, 289. A good example of the distinction is the Public Land Review Commission, which filed its report to Congress on the "public lands" in 1970. Indian lands were expressly exempted from that study of the public lands. See 43 U.S.C. § 1400.

[27] Chambers, supra note 20, pp. 1217–20, 1236, 1246–48.

[28] Chambers, supra note 20, pp. 1243–45. See also AIPRC final report, chapter 4, below.

[29] *Seminole Nation* v. *United States*, 316 U.S. 286 (1942); *Manchester Band of Pomo Indians* v. *United States*, 363 F. Supp. 1238 (N. D. Cal. 1973).

[30] 25 U.S.C. § 70.

[31] 28 U.S.C. § 1505.

[32] See generally, Chambers, supra note 20.

[33] Chambers, supra note 20, p. 1234.

[34] 5 U.S.C. §§ 701–06.

Many basic aspects of the trust obligation extend to an individual Indian wherever he or she may be. The duty to protect his tribal government, the duty to protect his trust resources, and the duty to acknowledge his tribal identity continue undiminished even though the individual Indian may have left the reservation.

The research of this Commission shows that the Bureau of Indian Affairs, the primary agent of Congress in the administration of the trust responsibility, has used the trust doctrine as a means to develop a paternalistic control over the day-to-day affairs of Indian tribes and individuals.[35] The trust responsibility calls for no such course of conduct. Clearly expressed congressional legislation calls for self-determination and self-government by Indian tribes.[36] Federal-Indian trust law, as expressed both by Congress and the courts, calls for Federal protection, not Federal domination.

PLENARY POWER: CONGRESSIONAL AUTHORITY OVER INDIAN AFFAIRS

The Constitution grants Congress broad power over Indian affairs. The scope of this power is extraordinary, and is perhaps equaled only by the power of the Federal Government over international relations. Congress' authority in Indian affairs is commonly referred to as "plenary," which means absolute or total.

Indians are expressly mentioned twice in the Constitution. "Indians not taxed" are excluded from the count for determining representatives to Congress.[37] Far more importantly, Congress is expressly given power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." [38] Congress has ratified many treaties with Indians; thus the treatymaking power and the power to spend money for the "general Welfare of the United States" have also been used to support Congress' authority over Indian affairs.[39]

The Supreme Court, relying primarily on the commerce clause and the treatymaking power, has recognized that Congress under the Constitution has exclusive power over Indian affairs.[40]

The plenary power over Indian affairs is not limited to federally recognized tribes, but rather extends to "all dependent Indian communities within its borders." [41] There are several instances in which the trust relationship has been terminated but later restored by Congress.[42] The trust relationship may remain in effect, especially in areas relating to land, even though the Bureau of Indian Affairs has failed to designate a tribe as federally recognized.[43] Thus Congress' power reaches all Indian tribes in the United States, including terminated and "nofederally recognized" tribes; the question is whether, and to what extent, Congress has chosen to exercise that power in regard to a given tribe. The best recent example of a full congressional resumption of the Federal-tribal relationship is the Menominee Restoration Act of 1973, where Congress restored the terminated Menominee Tribe by exercising its plenary power over Indian affairs.[44]

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[35] See, e.g., Report of Task Force II, pp. 13–17.

[36] Report of Task Force IX (vol. 1), p. 75. See also *Bryan* v. *Itasca County*, — U.S. —, 96 S. Ct. 2102, 2111 n. 14 (1976).

[37] U.S Constitution, amendment XIV, sec. 2.

[38] U.S. Constitution, art. I, sec. 8, clause 3.

[39] U.S. Constitution, art. II, sec. 2, clause 2 (Treaty Power); art. I, sec. 8, clause 1 (General Welfare). See generally, Cohen, supra note 3, pp. 89–90.

[40] *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 172 n. 7 (1973).

[41] *United States* v. *Sandoval*, 321 U.S. 28, 46 (1913); *U.S.* v. *Ramsey*, 271 U.S. 467, 471 (1926).

[42] See, e.g., the discussion in *Conley* v. *Ballinger*, 216 U.S. 84, 90 (1910).

[43] See, e.g., *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370 (1st cir. 1975); cf. *Crain* v. *First National Bank*, 324 F. 2d 532 (9th cir. 1963).

While Congress' plenary power over Indian affairs is extensive,[45] there are limits on the power. When tribal or individual property rights are taken away, the tribe or individual is entitled to be compensated in cash for the loss.[46] In addition, Congress' plenary power over Indians is subject to other constitutional limitations upon congressional power, such as the Bill of Rights.[47]

It is Congress, not the Bureau of Indian Affairs or any other administrative agency, which possesses this plenary power. Those agencies hold only such powers over Indians as Congress has granted to them.[48] Courts, therefore, have struck down administrative action over Indians because the action was not within the scope of authority delegated by Congress to the agency, even though Congress itself clearly had the power to take the action in question.[49]

Congressional action in furtherance of its plenary power over Indians is not violative of the Equal Protection and Due Process Clauses, which prohibit discrimination on the basis of race. The trust relationship, jurisdictional patterns in Indian country, and Federal programs for Indians are not unconstitutional "reverse discrimination" because they result in a special status for Indians. The reason for this is that the United States' relationship with Indian tribes is political, not racial, in nature; plenary power is intergovernmental in character and exists between the United States and the tribes in their capacities as governments. The Supreme Court, in rejecting arguments based upon the Equal Protection and Due Process Clauses, has upheld a Federal hiring preference for Indians; affirmed the jurisdiction of tribal courts over tribal members; and upheld reservation tax immunity from State law.[50]

Powers which spring from concepts of natural right and justice are premised on a measure of consent by the governed. The history of Federal dealings with the Indian people has much too often been rule based on power, rather than on consent of the governed.[51]

DEFINITION OF INDIAN: TRIBAL MEMBERSHIP

Who is an Indian? Early judicial decisions held that an Indian is a person who is ethnically or legally part of his or her tribe.[52] Recognition by the tribe, once given, was not easily lost.[53] This Commission has found, for example, that off-reservation Indian people identify themselves in the context of their tribal affiliation.[54] The tribe's power to determine its own membership, that is, individual identity as an Indian, has been repeatedly recognized by the courts; the power derives from the tribe's status as a distinct political party.[55] The tribe's power over its own membership is the starting point for any discussion of Indian identity.

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[44] U.S.C. § 903.

[45] In all of the long history of Congress' dealings with Indians, there is only one instance in which congressional power has been overturned by the courts. *United States* v. *Cleveland*, 503 F. 2d 1067 (9th cir. 1974). Compare *United States* v. *Antelcope*, 44 U.S.L.W. 4361 (April 1977), reversing 523 F. 2d 400 (9th cir. 1975).

[46] See, e.g., *United States* v. *Creek Nation*, 295 U.S. 103 (1935).

[47] Cohen, supra note 3, p. 91.

[48] Cohen, supra note 3, p. 100.

[49] See, e.g., *Ruiz* v. *Morton*, 415 U.S. 199 (1973).

[50] *Morton* v. *Mancari*, 417 U.S. 535 (1974); *Fisher* v. *District Court*, 424 U.S. 382 (1976); *Moe* v. *Confederated Salish & Kootenai Tribes*, —— U.S. ——, 96 S. Ct. 1634 (1976).

[51] See, e.g., *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565–66 (1903).

[52] Cohen, supra note 3, p. 2.

But Congress can, and has, passed laws to define Indian status for some Federal purposes. Although no statute has laid down a general definition of "Indian,"[56] Congress has sometimes set standards to define Indian status for special purposes. Older legislation used various degrees of Indian blood for different tribes,[57] but those standards were often arbitrary and conflicted with tribal provisions.[58] Recent congressional legislation, however, has avoided these conflicts and has given recognition to the primary tribal interest in membership by defining "Indian" as a member of an Indian tribe.[59]

In the area of eligibility for Federal services, the Bureau of Indian Affairs and other Federal agencies must work within definitions given by Congress. For example, the Indian Reorganization Act of 1934 contains a definition of "Indian" for the implementation of that Act. That definition includes all members of federally recognized Indian tribes regardless of degree of Indian blood.

Despite that statutory definition, the Bureau of Indian Affairs and the Indian Health Service for many years defined "Indian" for purposes of employment preference as any person who was a member of a federally recognized Indian tribe and one-fourth or more Indian blood. This administrative criterion was challenged in court as being contrary to the definition in the IRA. The Government conceded in a final judgment that the statutory definition in the IRA controlled.[60] Similarly, a recent Supreme Court case found that the BIA had acted improperly by denying welfare services to Indians living "near" reservations while providing the benefits to those living "on" reservations.[61] Again, the reasoning was that the BIA was acting contrary to congressional direction in denying benefits to tribal members.

In most circumstances, then, a person is an Indian if that person's tribe recognizes him or her as an Indian. That means that the tribe, as a political institution, has primary responsibility to determine tribal membership for purposes of voting in tribal elections, property distributions, exercise of treaty rights, Indian preference, and other rights arising from tribal membership.[62] Many tribal provisions call for one-fourth degree of blood of the particular tribe but tribal provisions vary widely.[63] A few tribes require as much as one-half degree of tribal blood and a small number permit any descendant of a tribal member to be enrolled, regardless of the blood quantum.[64] For tribal purposes, that tribal definition is final. Absent express congressional action, the Bureau of Indian Affairs has no power to alter tribal determinations.[65]

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[53] E.g., K. Llewellyn and E. Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence, 9–13 (1973).

[54] Report of Task Force VIII, p. 12.

[55] See, e.g., *Patterson v. Council of Seneca Nation*, 245 N.Y. 433, 157 N.E. 734 (1927); *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906).

[56] Cohen, supra note 3, p. 4.

[57] See, e.g., Cohen, supra, note 3, p. 5.

[58] See memorandum to Ernest Stevens from Jerry Straus, Wilkinson, Cragun & Barker on enrollment requirements of federally recognized tribes, Jan. 25, 1977 (memorandum in Commission files).

[59] See, e.g. 25 U.S.C. § 450b(a) (Indian Self-Determination and Education Assistance Act of 1975); 25 U.S.C. § 479 (Indian Reorganization Act); 25 U.S.C. § 1452(b) (Indian Financing Act of 1974).

[60] *Whiting v. United States*, civ. No. 75–3007 (D.S.D. 1975). For a more detailed discussion of this issue, see Report of Task Force IX (vol. 1), p. 110.

[61] *Ruiz v. Morton*, 415 U.S. 199 (1974).

INDIAN TREATIES: CORNERSTONES OF INDIAN LAW

Indian treaties, which have played such a central role in the development of Indian law and policy, were negotiated during the 18th and 19th centuries. These legally binding agreements were made between governments, the United States on the one hand and the tribes on the other. The courts have treated the parties as substantial equals; both sides agreed to compromises, with the tribes giving up claims to vast areas of land. Treaties were negotiated in the field by members of the executive branch of the Government, and went into effect after being ratified by the Senate. Unless abrogated (i.e., breached or broken) by subsequent Federal statute in whole or in part, treaties remain fully in effect.

Indian treaties are superior to all State laws and are entitled to equal dignity with any Federal statute. They are the "supreme law of the land."[66]

Treatymaking continued until 1871 when Congress passed legislation which brought future treatymaking with Indian tribes to an end.[67] After 1871, no further treaties were negotiated but the United States continued to deal with Indian tribes in essentially the same manner through "agreements" which are ratified by both the House and the Senate, Executive orders, and statutes.[68]

Treaties, while an extremely important part of Federal policy toward Indians, were by no means the only method used to deal with Indian tribes. The Trade and Intercourse Acts, which regulated trade with the tribes and controlled the liquor traffic, were another major means by which Congress dealt with the tribes.[69] Treaties, however, deserve special mention because of the important legal rights which they establish, because of their importance in the development of Indian law, and because of their great significance to American Indians today.

The courts have always interpreted treaties in a manner favorable to the tribes. The historical realities of brutal and inequitable relations with Indians, along with the serious language problems existing during the treaty negotiations, led to the development of three basic canons of treaty construction:

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[62] For discussion of the different policy questions raised by Indian identity for purposes of the preference statutes, see Report of Task Force IX (Vol. 1), pp. 185–219.

[63] See note 58, supra.

[64] Id.

[65] Cohen, supra note 3, p. 114.

[66] United States Constitution, art. VI, sec. 2. This provision applies with regard to Indian treaties. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Treaties are superior to State laws, including State constitutions. *Hauenstein* v. *Lynham*, 100 U.S. 483, 490 (1880), and are accorded equal dignity with Federal statutes. See, e.g., *Edye* v. *Robertson*, 112 U.S. 580, 599 (1884); *Reid* v. *Covert*, 354 U.S. 1, 17 (1957).

[67] 25 U.S.C. sec. 71.

[68] See, e.g., *Antoine* v. *Washington*, 420 U.S. 194 (1975).

[69] Francis Paul Prucha, American Indian Policy in the Formative Years, pp. 1–4 (1962) (Harvard Univ. Press).

1. Ambiguous expressions in treaties must be resolved in favor of the Indians;[70]

2. Treaties must be interpreted as the Indians themselves would have foreseen and understood them;[71]

3. Treaties must be liberally construed in favor of the Indians.[72]

By using these canons, the courts have given expansive readings of Indian treaties. For example, the word "trust," or similar language, was never used in the treaties, but the courts have implied the existence of a trust relationship in treaties.[73] The treaty phrase "to be held as Indian lands are held" has been interpreted to include provision for hunting and fishing rights.[74] Treaty provisions reserving the right to fish at "usual and accustomed places" have been held to reserve appropriate easement rights over non-Indian land to gain access to off-reservation sites.[74a] The Supreme Court held recently that general provisions for the protection of the Navajo Tribe served to bar the operation of State taxes upon Indians in Indian country.[75]

The *Winters* doctrine, providing that the reservation of sufficient waters for tribal use is implicit in Indian treaties, has been developed and consistently affirmed by the Supreme Court. Under that doctrine, Indian water rights precede and preempt any other rights established by State law.[76] The fishing rights decisions in the Northwest provide another example of how the canons of construction have protected basic treaty rights from encroachment by the States.[77]

One of the most significant elements of Indian treaty law is that Indian treaties were not a grant of rights from the United States to the tribes, but rather a grant from the tribes to the United States. Thus, all sovereign powers of tribes are retained unless expressly granted away by the tribe in a treaty or expressly taken away from the tribe by Federal statute.[78]

Indian treaties, then, are not to be read in a neutral way. The courts have found that the historical circumstances surrounding treaty negotiations require rules of construction which cut in favor of the tribes.

Indian treaties, like international treaties, can be abrogated by Congress.[79] Questions of whether Congress actually has intended to abrogate treaties have arisen frequently. The issue often comes up when administrative officials argue that general Federal statutes, which do not mention Indian tribes, regulate hunting and fishing rights, water rights, mineral rights, jurisdiction, and rights to the retention of land. A crucial point is that only Congress has the power to abrogate Indian treaties or otherwise regulate Indian affairs; the administrative agency seeking to limit Indian rights must have specific delegated authority from Congress before it can abrogate a treaty or otherwise diminish Indian rights.

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[70] *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930).

[71] *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 631 (1970); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938).

[72] *Choctaw Nation* v. *United States*, 318 U.S. 423, 431–32 (1943); *Tulee* v. *Washington*, 315 U.S. 681, 684–85 (1942).

[73] See, e.g., *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[74] See., e.g., *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

[74a] See, e.g., *United States* v. *Winans*, 198 U.S. 371 (1905).

[75] *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973).

[76] *Winters* v. *United States*, 207 U.S. 564 (1908); *Arizona* v. *California*, 373 U.S. 546, 599–600 (1963).

[77] See, e.g., *United States* v. *Washington*, 525 F. 2d 676 (9th cir. 1975); *Sohappy* v. *Smith*, 529 F. 2d 570 (9th cir. 1976).

[78] *United States* v. *Winans*, 198 U.S. 371 (1905); *Winters* v. *United States*, 207 U.S. 564 (1908); *United States* v. *Santa Fe R.R.*, 314 U.S. 339 (1942).

[79] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

The courts have cut back on administrative action affecting treaty rights by requiring very explicit directions from Congress to the agency. Absent such a showing of congressional action, treaty rights remain intact; treaty rights cannot be abrogated "in a backhanded way." [80] Although the law is not fully consistent in the area, the better reasoned cases hold that treaty rights cannot be eliminated by administrative action unless there is a specific congressional statute which identifies the specific affected Indian treaty rights and which states that it is the intent of Congress to abrogate such rights.[81] No Supreme Court case in the last 50 years has upheld any asserted abrogation of an Indian treaty.[81a]

The principles discussed above were developed in the context of Indian treaties; if those principles were limited solely to treaties, many tribes would not benefit from them because many reservations were established by Federal action other than treaties. The courts have recognized, however, that treaties are but one method of dealing with tribes and that treaty law is generally applicable to agreements, statutes, and Executive orders dealing with Indians.

The trust relationship, for example, was first applied to the Cherokee treaty but has since been applied in numerous nontreaty situations.[82] The rules of treaty construction apply not only to treaties but also to statutes.[83] Hunting and fishing rights can be established by methods other than treaty.[84] Similarly, the Supreme Court has ruled that exclusive tribal jurisdiction can be established by agreement or Executive order, as well as by treaty.[85]

Indian treaties, therefore, are an important foundation of all Indian law. Most early court cases involved treaty tribes. Policy changed, however, and the United States began to deal with Indian tribes by other means, such as Executive orders, agreements, and statutes. When those nontreaty tribes came into court, the rules of construction governing treaties were applied.

While this discussion has focused on treaties as law, any discussion of treaties would be incomplete without mention of their symbolic and moral significance to the Indian people. Unlike almost all other documents in Anglo-American law, treaties are seen as moral statements which represent the "word of the nation" and the "sanctity of the public faith." [86] An Indian treaty is "a bulwark against State encroachment * * *. It is a monument to past guilt; and efforts to change the law include, in themselves, evidences of continued uneasiness." [87]

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[80] *Menominee Tribe* v. *United States*, 301 U.S. 404, 412 (1968).

[81] See, e.g., *United States* v. *White*, 508 F. 2d 453 (8th cir. 1974); Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long A Time is That?, 63 Cal. L. Rev. 601 (1975).

[81a] In *F.P.C.* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960) a taking of Indian lands was upheld by the Court, but the majority opinion squarely held that the lands in question were "not subject to any treaty." 362 U.S. at 123.

[82] Chambers, supra note 20, pp. 1214–15. See, e.g., *United States* v. *Ahtanum Irrigation District*, 236 F. 2d 321 (9th cir. 1956) and *United States* v. *Walker River Irrigation District*, 104 F. 2d 334 (9th cir. 1939).

[83] See, e.g., *Antoine* v. *Washington*, 420 U.S. 194 (1975).

[84] See, e.g., *Antoine* v. *Washington*, *supra*.

[85] *Perrin* v. *United States*, 232 U.S. 478 (1914); *Fisher* v. *District Court*, 424 U.S. 382, 96 S. Ct. 943 (1976).

[86] *United States* v. *Winans*, 198 U.S. 371, 380 (1905); *Ward* v. *Race Horse*, 163 U.S. 504, 516 (1896)

[87] Monroe Price, Law and the American Indian, p. 294 (1973).

This Commission, in hearing after hearing, has seen that American Indians rightfully expect that this Nation will continue to abide by the solemn promises made in these old laws: The Constitution is an old law, too. Thus while treaties can be broken by Congress, such extreme action must be truly a last resort.[88] As Justice Hugo Black put it: "Great Nations, like great men, should keep their word." [89] Indian treaties are among the very few laws in our society which raise those kinds of issues.

JURISDICTION: VARYING RIGHTS AND RESPONSIBILITIES IN INDIAN COUNTRY

THE IMPORTANCE OF JURISDICTION

"Jurisdiction" sounds like an arcane word for lawyers only. To reservation Indians, it is far more than that. Jurisdiction is a living reality which has a direct, dramatic effect on their day-to-day lives.

Sovereignty refers to the powers of a government. Jurisdiction, as used here, refers to the human conduct (subject matter jurisdiction) and to the geographic area (territorial jurisdiction) over which a government's sovereign powers can be exerted. The question is whether conduct in Indian country (which usually means all land within reservation boundaries) will be regulated by the legislatures and courts of the tribes themselves or by the State or Federal Government.

Tribal councils (tribal legislatures) and tribal courts possess original jurisdiction within Indian country. As a general rule the States have no jurisdiction over matters involving Indian tribes or Indian people in Indian country absent a Federal statute giving them jurisdiction. Accordingly, absent Federal authority to a State, all Indian reservations within a State are islands where the laws of the State cannot reach. Those islands are governed by the institutions of the tribes. To put it another way, the laws of Arizona have no effect for most purposes in New Mexico or Utah. Absent express Federal legislation, the laws of Arizona have no effect for most purposes on the Papago and Navajo reservations. Only Federal legislation can change that pattern.

For its part, the Federal Government possesses and exercises only that jurisdiction which the Congress expressly provides for, even though potentially, its plenary authority is all encompassing.

Jurisdiction is both criminal and civil. Criminal cases involve wrongs against the public, ranging from disorderly conduct to murder, which become the subject of prosecutions resulting in imprisonment or fine. If a legislature has jurisdiction, it can define criminal conduct in many areas which are especially sensitive to Indians, such as questions involving hunting and fishing rights. The existence of jurisdiction will determine whether crimes will be defined by tribal councils or by State legislatures or Congress. Questions of criminal jurisdiction will also resolve whether violations of such criminal laws will be handled by Indian or non-Indian judges, jurors, prosecutors, policemen, and jailers.

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[88] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[89] *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (dissenting opinion).

Criminal jurisdiction, then, will determine whether crimes in Indian country are tried in tribal courts by Indians; in the local State courts where hostility by non-Indians is often great; or in Federal courts which are often inconveniently distant from the reservations but where there is usually less antagonism against Indians. In some situations, two governments can have "concurrent" jurisdiction. That is, it is sometimes possible for a criminal defendant to be tried in either tribal or State court for alleged criminal conduct. In other situations, it is possible that a criminal defendant could be subject to the concurrent jurisdiction of either the tribal court or the Federal court. In most cases, when two courts have concurrent jurisdiction, the individual will be tried and punished in the court where the case is first prosecuted.

Civil, as opposed to criminal, jurisdiction involves private or individual disputes such as debts, automobile accidents, and disputes over leases. Governments also pass civil laws in critically important areas such as child custody, education, zoning, domestic relations, environmental planning, and alcoholism. Again, the civil jurisdictional issue is truly fundamental: whether these important laws affecting Indian country will be passed by tribal councils or by non-Indian legislatures. Similarly, the question arises as to which government's courts have jurisdiction to hear civil cases—tribal courts, State courts, or Federal courts. As with criminal jurisdiction, in a limited number of situations, there can be concurrent civil jurisdiction between two courts.

Jurisdiction to tax has been the subject of continuing litigation and deserves special mention. The States have sought to increase their revenues by taxing persons and activities on the reservations. An increasing number of tribes believe that tribal taxation jurisdiction is essential to the long range economic viability of tribal governments. The problem is twofold. For most purposes, reservations are immune from State taxes; individual tribal members and struggling tribal businesses badly need those exemptions. On the other hand, tribes themselves have powers to tax persons and activities on the reservations. Future tribal economic self-sufficiency may well depend upon the continued existence of that power.

The discussion which follows provides a general outline of the jurisdictional pattern in Indian country. A more detailed analysis of each of these areas appears in chapter 5 of this report.

INDIAN COUNTRY

Jurisdiction is often a question of the specific geographic area which is covered by the sovereign powers of a given government. Usually Indian jurisdiction cases involve disputes within reservation boundaries. The technical term "Indian country," however, is properly used to determine the geographic extent of tribal jurisdiction, and the geographic limits on State jurisdiction. The term "Indian country" is derived from 18 U.S.C., sec. 1151, which is a Federal criminal jurisdiction statute. That statutory definition of Indian country applies as well to questions of civil jurisdiction.[90]

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[90] *DeCoteau* v. *District County Court,* 420 U.S. 425, 427 n. 2 (1975).

The Indian country statute has three separate parts. First, Indian country is defined as all lands within the limits of any Federal Indian reservation, "not withstanding the issuance of any patent." Land within reservation boundaries which has been opened to settlement by non-Indians is Indian country unless Congress intended to diminish the reservation.[91] Thus, Indian country includes all land within the reservation boundaries, including "checkerboarded" land—that is, those areas within Indian reservations where non-Indian land is interspersed with Indian land. Second, Indian country includes all dependent Indian communities within the borders of the United States.[92] Third, Indian country includes all Indian trust allotments, even though they may not be within the boundaries of a reservation.

Normally, unless expressly limited by Federal legislation, Indian tribes have criminal and civil jurisdiction in Indian country. On the other hand, absent express Federal legislation, States do not have jurisdiction within Indian country. The reverse is true outside of Indian country: absent express Federal law to the contrary, Indians leaving Indian country have generally been subject to State law otherwise applicable to all citizens of the State.[93]

ORIGINAL EXCLUSIVE TRIBAL JURISDICTION

Congress, acting pursuant to its plenary power, has passed a number of laws altering original exclusive tribal jurisdiction. Exclusive tribal jurisdiction, however, existed before such laws were passed. It is best, therefore, to examine the nature of exclusive tribal jurisdiction and then to discuss the ways in which Congress has limited that jurisdiction.

Two cases serve to show the nature of the exclusive tribal criminal and civil jurisdiction which exists in the absence of limiting Federal legislation. In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that a Federal court had no jurisdiction to try a Sioux Indian for the murder of a fellow Indian which occurred in Indian country. In the absence of any Federal legislation to the contrary, therefore, only the Indian tribe has jurisdiction to punish the murder of an Indian by an Indian on the reservation. The same principle applies to all other crimes in Indian country; unless Congress so provides, there is no State jurisdiction and there is no Federal jurisdiction.

The same principles apply in civil situations. *Schantz* v. *White Lightning*, 231 N.W. 2d 812 (N.D. 1975), involved an automobile accident on the Standing Rock Sioux Indian Reservation. The allegedly negligent defendant was an Indian. A Federal court had earlier ruled that the action could not be brought in Federal court because there was no express Federal statute granting jurisdiction. The North Dakota Supreme Court held that the State courts had no jurisdiction over the subject matter. Only the tribal court had jurisdiction to hear the case.

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[91] *See, e.g., Mattz* v. *Arnett*, 412 U.S. 481 (1973) ; *Decoteau* v. *District County Court*, 420 U.S. 425 (1975).

[92] *United States* v. *Sandoval*, 231 U.S. 228 (1913).

[93] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973).

FEDERAL STATUTES ALTERING JURISDICTION IN INDIAN COUNTRY

Thus, in the absence of express Federal statutes altering the jurisdictional pattern, Indian reservations are geographic areas, governed by tribal law, where State and Federal jurisdiction do not reach. That jurisdictional pattern, however, is subject to Congress' plenary power. On several occasions, Congress has exerted its plenary power and altered the jurisdictional scheme in Indian country.

Angered by the result in the *Crow Dog* case, Congress in 1885 passed the Major Crimes Act, 18 U.S.C. sec. 1153. This Act extended Federal jurisdiction over seven enumerated crimes, which have now been expanded to 14. Under the Major Crimes Act, therefore, Federal courts now have jurisdiction over any Indian in Indian country who commits one of the specified crimes against the person or property of another Indian or any other person.[94] It is unclear whether the Major Crimes Act eliminates tribal jurisdiction entirely or whether it provides for concurrent Federal and tribal jurisdiction.[95]

Congress has also passed the General Crimes Act, 18 U.S.C. sec. 1152, which provides for Federal jurisdiction over crimes, other than the enumerated major crimes, by both Indians and non-Indians in Indian country. The Act provides that Federal laws applicable to Federal enclaves will be effective in Indian country. Exceptions to the Act are crimes committed by one Indian against the person or property of another Indian; Indians punished by the local law of the tribe; and areas preserved to tribes by treaty as being within their explicit jurisdiction. The Act establishes Federal jurisdiction but does not eliminate concurrent tribal jurisdiction.[96]

The General Crimes Act has been interpreted to permit the indirect enforcement of State law in Indian country. Although the States themselves cannot enforce such violations of State law, Federal authorities may bring such a prosecution in Federal court, basing the prosecution upon a violation of State law. This result was reached in ***Williams* v. *United States***, 327 U.S. 711 (1946), when the Supreme Court reasoned that the General Crimes Act, in extending Federal enclave laws to Indian country, also extended the Assimilative Crimes Act, 18 U.S.C. sec. 13. The Assimilative Crimes Act, in turn provides that State law is applicable within Federal enclaves if the act in question is not otherwise punishable by any Federal statute.[97] The application of the Assimilative Crimes Act in Indian country is subject to all the limitations in the General Crimes Act.

The above Acts, then, gave the Federal courts authority to hear various criminal cases arising in Indian country. Under those Acts, the States acquired no jurisdiction in Indian country. Although some

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[94] The jurisdiction of tribal courts has been limited in one relevant respect which does not involve Federal statutes. The Supreme Court has held that State courts have jurisdiction over crimes by a non-Indian defendant against a non-Indian victim in Indian country. *See, e.g.*, *United States* v. *McBratney*, 104 U.S. 621 (1881) ; *Draper* v. *United States*, 104 U.S. 240 (1896) ; *United States ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946).

[95] *See* the discussion in Report of Task Force IV, pp. 36–39.

[96] Report of Task Force IV, p. 40 ; AIPRC Final Report, ch. 5, below.

[97] This issue is discussed in more detail in Report of Task Force IV, pp. 40–42 and ch. 5, below.

State laws indirectly reach to Indian country, the States cannot bring such prosecutions in their own courts. If such prosecutions based on State law are to be brought, they must be brought in Federal court by Federal prosecutors.

The most fundamental realignment of jurisdictional patterns in Indian country occurred during the termination era. In 1954, Congress for the first time passed a general statute extending the jurisdiction of State courts to Indian country through the passage of Public Law 280. This statute gave the States jurisdiction over some criminal matters, 18 U.S.C. sec. 1162, and some civil matters, 28 U.S.C. sec. 1360, in Indian country.

Public Law 280 provides for State assumption of jurisdiction in Indian country in three separate ways. First, assumption of jurisdiction was mandatory in five, now six, States.[98] Second, in those States with State constitutional disclaimers barring jurisdiction in Indian country, assumption could be accomplished by appropriate State action to override the constitutional disclaimer.[99] Third, in all other States, assumption of jurisdiction was originally at the option of the State by affirmative legislative enactment.[100] Since 1968, no State can assume Public Law 280 jurisdiction without the consent of the tribe in question; 25 U.S.C. sec. 1321, 1322. In addition, there is now a statutory provision for retrocession, which permits the States to relinquish jurisdiction which it might have asserted under Public Law 280; 25 U.S.C. sec. 1323. Public Law 280 expressly excludes any State jurisdiction relating to the alienation or taxing of trust property, or to treaty recognized hunting, fishing, or trapping rights.

The full extent of State legislative jurisdiction under Public Law 280 was unclear for years. A major area of confusion has now been resolved by the Supreme Court in *Bryan* v. *Itasca County*, 96 S. Ct. 2102 (1976), where the Court held that the State was without authority to levy a personal property tax on the reservation. The Court found that Public Law 280 did not extend general civil regulatory powers, including taxation, into Indian country. Rather, Public Law 280 relates only to the application of State criminal and civil law in court proceedings. In the civil area, Public Law 280 provides State courts as a forum to resolve private disputes, but does not permit the legislature generally to regulate conduct in Indian country.

Many questions in regard to Public Law 280 remain unanswered.[101] It permits different results from State to State and, in some cases, from reservation to reservation within States. This complexity is particularly apparent in five States—Idaho, Mississippi, Nevada, New Mexico, and Washington—where only partial State subject matter jurisdiction has been asserted. The present statutory framework, which permits retrocession and requires tribal consent, seems likely to result in a shrinkage of State jurisdiction.

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[98] The five original States are California, Minnesota, Nebraska, Oregon, and Wisconsin, although specified reservations within those States were not made subject to Public Law 280. Alaska was added to this mandatory group at the time of its statehood.

[99] These States are Arizona, Montana, New Mexico, North Dakota, South Dakota, Utah, and Washington. For the nature of the action taken concerning Public Law 280 in these States, *see* the Report of Task Force IV, pp. 14–19.

[100] For the States which have assumed Public Law 280 jurisdiction, *see* Report of Task Force IV, pp. 8–9.

[101] *See* generally, Report of Task Force IV, pp. 4–33, and ch. 5, below.

The final major jurisdictional Act is the Indian Civil Rights Act of 1968, 25 U.S.C. sec. 1301–03. That Act, which was bitterly opposed by most tribes, applied to tribes statutory standards that are similar, but not identical, to those constitutional requirements contained in the Bill of Rights and the Fourteenth Amendment.[102] The Act expressly gives jurisdiction to the Federal district courts to proceed by habeas corpus and has been construed to permit declaratory and injunctive relief.[103] The Indian Civil Rights Act does not in any way extend jurisdiction to State courts, but, in fact, specifically authorized States to retrocede jurisdiction previously acquired under Public Law 280.

There have been other Federal statutes, usually not mentioning Indians expressly, which have been construed to create jurisdictional inroads into Indian country. The effect of these Acts has been referred to as "creeping jurisdiction", because they have had a clear impact on the reservations even though they were not expressly directed at affecting the Federal-State-tribal jurisdictional relationship.[104] Examples of general Federal legislation which may have full or partial effect in Indian country are the Administrative Procedure Act, including the Freedom of Information Act; Federal condemnation statutes, often administered by the Army Corps of Engineers; the National Environmental Policy Act; the Clean Air Act, which delegates some authority to States; the Occupational Safety and Health Act, which also delegates some authority to the States; and the National Labor Relations Act. The question of whether all or some of these Acts in fact apply in Indian country is not fully resolved, but some lower courts have applied them to Indian country; the consequence is to allow some increased State and Federal jurisdiction on the reservations.

THE RECENT CASES

During the last 20 years the courts have clarified many of the basic issues concerning tribal and State jurisdiction in Indian country. Tribal jurisdiction over individual Indians and Indian-owned land in Indian country is well-established with one major exception: the courts have not yet ruled whether tribes have concurrent jurisdiction with the States when Public Law 280 applies. Tribal jurisdiction over non-Indian individuals[105] and land[106] has been upheld by opinions in the lower courts and appears to be supported by the Supreme Court opinion in *United States* v. *Mazurie*, 419 U.S. 544 (1975).[107] The full extent of tribal jurisdiction over non-Indians, however, has not been comprehensively treated by the United States Supreme Court.

The United States Supreme Court, construing congressional statutes, has remained a bulwark against asserted State jurisdiction in

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[102] Report of Task Force IV, pp. 129–49.

[103] *See, e.g., Johnson* v. *Lower Elwha Tribal Community*, 484 F. 2d 209 (9th cir. 1973); *Luxon* v. *Rosebud Sioux Tribe of South Dakota*, 455 F. 2d 698 (8th cir. 1972).

[104] For a review of this matter, *see* Report of Task Force IV, pp. 47–54, and Task Force IX, pp. 76–94.

[105] *See, e.g., Oliphant* v. *Schlie*, 544 F. 2d. 1007 (9th cir. 1976), cert. granted; *Confederated Tribes of the Colville Indian Reservation* v. *Washington*, 412 F. Supp. 651 (E.D. Wash. 1976).

[106] *See, e.g., Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th cir. 1958); *United States* v. *Blackfeet Tribal Court*, 244 F. Supp. 494 (D. Mont. 1965).

[107] The *Mazurie* opinion is discussed above in relation to tribal sovereignty.

Indian country. As long ago as 1832, the Court rejected the premise that Georgia law could apply on the Cherokee Reservation. The emphasis on tribal government, and freedom from State jurisdiction in the absence of express Federal authority, has continued down to the present day.

The recent cases have consistently struck down attempts by the States to extend their jurisdiction to Indian country. In *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court held that the Navajo Tribal Court had exclusive subject matter jurisdiction over an action for debt by a non-Indian against an Indian: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations." In *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), the Court held that a State gross proceeds tax did not apply to a non-Indian trader on the reservation because of the general Federal regulatory scheme over traders: "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control * * *." The leading case, *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973), struck down a State attempt to levy a personal income tax on a reservation Indian: the creation of the Navajo reservation "was meant to establish the lands as within the exclusive sovereignty of the Navajos under general Federal supervision." *Fisher* v. *District Court*, 424 U.S. 382 (1976) held that Montana State courts did not have jurisdiction over an adoption case involving reservation Indians because "state-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the tribal court."

The Supreme Court has been almost unyielding in rejecting State jurisdiction in Indian country, absent express congressional grant to the States, even when non-Indians are involved. State jurisdiction over non-Indians will be struck down if "the State action infringed on the right of reservation Indians to make their own laws and be ruled by them."[108] The only case in which the Supreme Court has used this "infringement" test from *Williams* v. *Lee* to permit any kind of State jurisdiction in Indian country is *Moe* v. *Confederated Salish and Kootenai Tribes*, 96 S. Ct. 1634 (1976). In *Moe*, the Court prohibited any taxation of Indians, but permitted the State to require Indian merchants to collect a tax assessed against non-Indians purchasing cigarettes from the Indian merchant. A line of older cases has permitted the State courts to take jurisdiction over crimes in Indian country in the limited number of situations in which both the criminal defendant and the victim are non-Indians.[109]

The Supreme Court has been even more protective of tribal self-government when States have asserted jurisdiction over Indians in Indian country. The Court looks first to determine whether Federal preemption has occurred. The most common method of Federal preemption occurs when an Indian reservation is established; once that happens Congress is found to have excluded State power over the reservation by "preempting the field." Once Federal preemption is found to exist, the Court will look to see if there is an express statute explicitly giving the State jurisdiction over the reservation. If there is no such statute, any asserted State jurisdiction over the reservation must be analyzed against the "backdrop" of tribal sovereignty.[110] The many recent opinions make it abundantly evident that the Court will view any attempted State incursion in the context of a vigorous and far-reaching notion of tribal sovereignty. The leading example is *Bryan* v. *Itasca County*, 96 S. Ct. 2102 (1976), where the Court found that even "Public Law 280" does not extend general State tax and regulatory law into Indian country.

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[108] *Williams* v. *Lee*, 358 U.S. 217 (1959).
[109] *See* footnote 94; supra.

It is instructive to place the immunity of Indian tribes from State jurisdiction in historical perspective. Since *Williams* v. *Lee* was handed down in 1958, the Supreme Court has permitted State jurisdiction over non-Indians in Indian country only once—and that was in the very limited context of *Moe*, discussed above. Since that period, the Court has never upheld any asserted State jurisdiction over Indians in Indian country. Indeed, in its long history the Supreme Court has never, absent express congressional authority, permitted any State to assume any jurisdiction whatsoever over Indians in Indian country.

SYNTHESIS: INDIAN TRIBES AND PEOPLE IN AMERICA'S LEGAL AND POLITICAL SYSTEM

Political science texts commonly state that there are four levels of government in the United States: the Federal Government, the State governments, the county governments, and local governments. In States where Indian country is located, that notion is incorrect and confusing. In fact, in those States there are two separate chains of government: the Federal Government and Indian tribes, on the one hand; and State, county, and local governments on the other. This is not to say that Indian tribes are instrumentalities or creations of the Federal Government. They are not. [111] It is analytically essential, however, to recognize that Federal law, not State law, is preeminent in Indian country. Tribal powers spring from the tribe's own inherent sovereignty and can be diminished only by express Federal, not State, action.

From the early days of this Republic, local interests have placed the greatest pressures on Congress to limit the land bases and powers of tribal governments. In some instances, such as the Allotment Act, Public Law 280, and the Termination Acts, those pressures were notably successful.

But, when one considers the long historical sweep of Federal-tribal relations, the marvel is that tribes have retained so many of their essential governmental powers. Similarly, with the exception of Public Law 280, tribal governments have retained the great part of their immunity from State jurisdiction.

This is partly due to congressional actions such as the Indian Reorganization Act and, most particularly, the progressive legislation during the 1970's. Congress has truly been a trustee during those periods.

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[110] *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973). *McClanahan* is discussed more thoroughly above. *See* text following footnote 8.

[111] *See, e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973); *Talton* v *Mayes*, 163 U.S. 376 (1895).

The station of American Indians in our society is also due to the classic opinions of the United States Supreme Court which developed the basic Indian law doctrines when the Cherokee Tribe came to that court of last resort in the 1830's. Those principles have since been reaffirmed and applied to other tribes and to other circumstances. Both of those doctrines—tribal sovereignty and the trust responsibility—remain vital and far-reaching today.

The development of Indian law and policy has not always been even. For the tribes, it has sometimes been two steps forward and one step back. But there can be no question about the essence of modern Federal Indian law and policy: it stands for strong tribal self-government and for strict protection against assertions of State jurisdiction. The three branches of the Federal Government have all spoken on those points.

Federal policy cannot, of course, provide a full picture of life on the reservations, in the cities, or in those areas occupied by terminated and nonfederally recognized tribes. It is a long way from Capitol Hill, the White House, and the Supreme Court building to Indian country.

Even today, many tribes exercise relatively few powers of self-government. No tribe has exercised the full range of those powers. The tribes still feel the effects of the restrictive Federal policies laid down between 1871 and 1933.

But since the termination era abated during the late 1950's and especially during the 1970's, the definite thrust of tribal policy has been toward a greater use of their powers of self-government. The terminated and nonfederally recognized tribes have sought to develop their existing rights and have attempted to reestablish the full Federal-tribal relationship. The federally recognized tribes, taken as a whole, have moved forcefully and responsibly in the direction of developing their governmental systems. Tribal legislatures are adopting social programs, land use planning measures, and tax plans to provide for the future. Tribal courts are expanding their systems of justice. Thus the States usually cannot govern on the reservations, but the tribes are showing that they can do the job competently and fairly.

These developments hold the greatest promise for the tribes. They hold promise for the land, which has been there forever, and for the generations which will be there tomorrow. Ultimately, that promise can only be realized by American Indians themselves. But the distinctive doctrines of Federal Indian law and policy are fundamental tools which the tribes have used and are using to fulfill that promise.

CHAPTER FOUR

TRUST RESPONSIBILITY

The Federal trust responsibility emanates from the unique relationship between the United States and Indians in which the Federal Government undertook the obligation to insure the survival of Indian tribes. It has its genesis in international law, colonial and U.S. treaties, agreements, Federal statutes and Federal judicial decisions.

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CHAPTER FOUR

TRUST RESPONSIBILITY

INTRODUCTION

The Federal trust responsibility to American Indians is one of the most important as well as most misunderstood concepts in Federal-Indian relations. Admittedly, it is a rather confusing legal concept with murky origins and inexact application. Indian opinion is clear that, along with tribal government powers, a reaffirmation by Congress of the Federal trust responsibility could go far in improving Federal-Indian relations and setting a firm course for Government policy which would give substance to self-determination for Indians.

It should be noted that many of the 11 Commission task forces discussed in their reports various aspects, legal analyses, and historical factors in the development of the Federal trust relation.[1] Moreover, several excellent law review articles and general essays have examined Federal judicial decisions, statutory and treaty law, and the historical evolution of the trust doctrine.[2] At least one of these has already been published in a congressional committee print.[3] And Congress previously has conducted hearings on matters which relate directly to what the trust means and how it is and should be administered.[4] What follows is a brief discussion of these elements of the law and history which are most relevant as background for the recommendations.

THE TRUST RELATIONSHIP

The relationship of the United States to Indians is "perhaps unlike that of any other two people in existence." [5] This statement was made by the Supreme Court almost 150 years ago, and while there have been great changes in that relationship since that time, it is still "marked by peculiar and cardinal distinctions which exist nowhere else." [6] One

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[1] *See* U.S. Congress. American Indian Policy Review Commission. Final Report of Task Force One, Trust Responsibilities and the Federal-Indian Relationship, including Treaty Review, sec. 7; Final Report of Task Force Two, Tribal Government; Final Report of Task Force Three, Federal Administration and Structure of Indian Affairs; Final Report of Task Force Five, Indian Education; Final Report of Task Force Seven, Reservation Resource Development and Protection; Final Report of Task Force Eight, Urban and Rural Non-Reservation Indians (45–56); Final Report of Task Force Nine, Law Revision, Codification and Consolidation. Washington, U.S. Gov't. Print. Off., 1976. Final Reports of Task Forces are hereinafter cited by Task Force number.

[2] For example, R. Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stanford L.R. 1213 (1975); C. Wilkinson and J. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth—How Long a Time is That?" 63 Cal. L.R. 601, 612–617 (1975).

[3] U.S. Congress. Senate Comm. on Judiciary, Subcomm. on Administrative Practices and Procedure. R. Chambers, A Study of Administrative Conflict of Interest in the Protection of Indian Natural Resources. Washington, U.S. Gov't. Print. Off., 1971 (91st Cong., 2d sess. Senate Comm. reprint).

[4] E.g., *see* hearing testimony on the proposed Indian Trust Counsel Authority. U.S. Congress Senate Comm. on Interior and Insular Affairs, hearings before Subcomm. on Indian Affairs on Nov. 22, 23. 1971. Washington, U.S. Gov't Print. Off. (92d Cong., 1st sess).

[5] *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 16 (1831).

[6] Id.

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of those distinctions involves the trust responsibility which the Federal Government owes to Indians.

The United States holds legal title to Indian lands, yet those lands cannot be disposed of or managed contrary to the equitable title resting with Indians. This means that while the United States Government has the appearance of title as the nominal owner of Indian trust lands, it is actually holding title entirely for the benefit and use of the Indian owners.

TRIBAL SOVEREIGNTY AND INDIAN CITIZENSHIP

Indian tribes are not parties to the U.S. Constitution or explicitly institutionalized as part of the federal system of governmental power, yet, similar to States, tribes do retain that degree of governmental sovereignty which they have not relinquished to the United States Government.[7] In other words, in the Constitution, the States delegated to the Federal Government certain powers, including whatever powers they may have had over Indian tribes and lands.[8] Similarly, Indian tribes, pursuant to treaties and agreements, relinquished certain powers to the Federal Government and retained others. Tribal members are United States citizens, yet they are citizens of their tribes also, giving them rights and privileges distinct from any other racial or cultural group in the Nation. Other examples of the different status pertaining to Indians are numerous but the point is that there is present in law and policy certain rights which are unique to Indian tribes and people.

The Federal trust responsibility emanates from the unique relationship between the United States and Indians in which the Federal Government undertook the obligation to insure the survival of Indian tribes. It has its genesis in international law, colonial and U.S. treaties, agreements, Federal statutes and Federal judicial decisions.[9] It is a "duty of protection" which arose because of the "weakness and helplessness" of Indian tribes "so largely due to the course of dealings of the Federal Government with them and the treaties in which it has been promised * * *." [10] Its broad purposes, as revealed by a thoughtful reading of the various legal sources, is to protect and enhance the people, the property and the self-government of Indian tribes. The extent to which these purposes have been understood fully, let alone carried out, have varied greatly over the decades. This lack of understanding and consistent policy has contributed immeasurably to Indian resentment and suspicion of Government programs.

WARDSHIP VERSUS TRUSTEESHIP

When Indians say they want control over their lives,[11] they often find the Federal trust responsibility being used as a tool (either deliberately or innocently) to deny them that control, to inject Federal bureaucracy where there should be self-government, to encourage paternalism where cooperation or independence should prevail. Much of this misuse could be avoided if the Federal duty would be viewed as flowing from a trustee/beneficiary relationship rather than a guardian/ward relationship. Although Indians have sometimes been referred to by the courts as "wards" and while this term may have been a fair description in the 1800's, it is a misleading characterization of the modern-day status of Indians. There is a very significant difference in the authority and control which may be exercised by a guardian as opposed to a trustee.

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[7] *See* F. Cohen, Handbook of Federal Indian Law 122 (1941).

[8] U.S. Const., art. III, sec. 8(3). *See Worcester* v. *Georgia*, 31 U.S. 515 (1832).

[9] *See*, generally, AIPRC, Task Force Nos. 1 and 8; also R. Chambers, note 2, *supra*. At least with respect to Indian lands, the Trade and Intercourse Act created a Federal trust responsibility. *Passamaquoddy Tribe* v. *Morton*, 528 F. 2d. 370 (1st cir. 1975).

[10] *United States* v. *Kagama*, 118 U.S. 375, 384 (1886).

[11] *See* e.g., AIPRC Task Force No. 3, app. D, Declaration of Indian Purpose; also Special Tribal Report of the Northwest Affiliated Tribes to the AIPRC.

In common law, the purpose of a guardianship is to protect minors or incompetents. The guardian does not have title to the ward's property but he does have the power to manage it. He is under the direct supervision of a court and is not required to consult with the ward in carrying out his duties.[12] This is distinguished from the Indian situation in which, like the common law trust, title to the property is split (thus requiring the consent of both the Federal Government and the Indians in order to dispose of the property), where management of the property is shared, and where the responsibilities of the Federal Government to account to the trust beneficiary are considerably broader than merely accounting to a court for the management of a ward's property. The relationship should be thought of not only in terms of a moral and legal duty, but also as a partnership agreement to insure that Indian tribes have available to them the tools and resources to survive as distinct political and cultural groups.

In many instances, the duty of the Federal Government in this relationship has been stated as one of "care" and "protection" of Indians. For example, in the treaty with the Cherokees of November 28, 1785,[13] the United States agreed to "give peace to all the Cherokees, and receive them into the favor and protection of the United States," to provide "benefit and comfort" and to prevent "injuries or oppressions". (Article IX). In the treaty, both the United States and the Cherokee Tribe were referred to as "contracting parties" (Article XIII). This language can be viewed as creating an "express trust" although the term "trust" has not been used.[14]

TRUSTEE'S DUTY OF CARE

The Federal duty can also be likened to the "implied trust" in common law whereby a trust is created by operation of law. Generally, such trusts are recognized by the courts on the basis of an implied intention of the parties to a transaction (resulting trust) or on the basis that recognition of a trust is necessary in order to prevent the unjust enrichment of one party who committed fraud, deception or some other wrongdoing (constructive trust).[15] In such circumstances, the requirements and restrictions imposed on a trustee are recognized even though no formal trust document creates them.

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[12] 5 A. Scott, Law of Trusts (3d ed. 1967).

[13] Vol. II, Kappler's Indian Affairs, Laws and Treaties 8–10.

[14] In order to create a trust it is not necessary to actually use the term "trust". Intent and circumstances will determine if an actual trust has been created. See, 1 A. Scott, Law of Trusts 174–187 (3d ed. 1967).

[15] 5 A. Scott, Law of Trusts 3213–3216 (3d ed. 1967).

This analysis of the United States duty to Indians as that of a trustee to his beneficiary is supported by many judicial decisions where common law trust principles were used to measure the actions of the Federal Government toward Indians.[61] Whether the creation of the responsibility is deemed an express trust or implied trust and whether the nature of the duty is identified as an active trust or a passive trust, the results are the same: the Federal Government is a fiduciary and as such is "judged by the most exacting fiduciary standards."[17] This means that it must act with good faith and utter loyalty to the best interests of the beneficiary.[18] It must keep the beneficiary informed of all significant matters concerning the trust and must not engage in "self-dealing."[19] Under common law principles, if the trustee manages the trust property in such a way that he may benefit (such as, for example, buying property for himself) and the beneficiary has not been fully informed of the transaction and consented to it, the transaction is voidable by the beneficiary, even though the trustee may have acted in good faith and the bargain was a fair and reasonable one. And even if the beneficiary did consent to the transaction prior to its taking place, he may still be able to void it if the trustee can be shown to have failed to disclose essential facts which he knew or should have known, or if he fraudulently induced consent, or if the bargain was not fair and reasonable.[20]

COURTS FIND GOVERNMENT ACCOUNTABLE

In addition to good faith and loyalty, the fiduciary relationship also requires that the trustee exercise the care, diligence, and skill of a prudent person in managing the trust assets of the beneficiary. This common law principle has been directly applied to the Federal trust responsibility to Indians.[21]

These doctrines are being applied increasingly by the courts to the actions of the executive agencies of the United States with respect to Indian lands,[22] water resources,[23] and trust funds.[24] But there is a key distinguishing factor present in the Federal trust relationship with Indians which does not occur in any other trust relationship: The trustee may unilaterally terminate the trust relationship. The ultimate trustee in Indian affairs is the United States Congress and it can establish or redefine the existence and scope of the Federal trust responsibility and even unilaterally dissolve the relationship if it chooses. This power stems from the plenary power of Congress in Indian affairs. This power and the Indian reaction to its exercise is discussed in chapter II. Congress has designated a principal agent for carrying out the trust, i.e., the Department of the Interior. That agent

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[16] *E.g., United States* v. *Mason*, 412 U.S. 391 (1973); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973).

[17] *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942).

[18] *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973). For further elaboration on this standard of performance, *see* 5 A. Scott, Law of Trusts 1298 (3d ed. 1967).

[19] 5 A. Scott. Law of Trusts 1277–1299 (3d ed. 1967).

[20] *Id.* at 1298.

[21] *United States* v. *Mason*, 412 U.S. 391 (1973); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10 (1944); *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973).

[22] *United States* v. *Creek Nation*, 295 U.S. 103 (1935).

[23] *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972).

[24] *Seminole Nation* v. *United States*, 316 U.S. 286 (1942).

cannot terminate the trust nor change the manner in which it is carried out, but the trustee (i.e., Congress) itself can. The beneficiary may be able to relieve the trustee of its trust responsibility in certain circumstances, but the extent to which that may be done should be clarified.[25]

CONFLICT OF INTEREST

These principles place the United States in a curious position. Not only is it charged as trustee for a private interest, i.e., Indians, but it also must balance competing interests in carrying out public policy. Therein, of course, lies the source of the long-lamented conflict of interest of the Federal Government in carrying out the Indian trust responsibility. What happens when perceived public policy is inconsistent with the Indian interests? Under the current administrative structure, Indian interests often suffer.[26]

While this conflict can never be entirely eliminated, it can be diminished greatly by vesting the primary responsibility for carrying out the trust responsibility in an Executive office which has as its single mission the protection of Indian tribes and improvement of the economic and social status of the Indian people. While the Bureau of Indian Affairs is charged currently with the primary obligation for carrying out the Federal trust responsibility in most subject areas, it cannot fill that role adequately while subject to the competing demands present within the Department of the Interior. It is difficult to reconcile, for example, the functions of the Bureau of Land Management and the Bureau for Fisheries and Wildlife with the requirements of the trust to protect the Indian land base, forestry, mineral resources, and hunting and fishing rights. (See chapter VI for proposals to alleviate this administrative conflict of interest.)

This does not imply, however, that the Federal trust duty rests solely with one Executive office. Courts have firmly stated that the trust duty is an obligation of the United States Government.[27] Legally there may be, and practically there should be, a prime agent in the Federal Government which insures that the trust is carried out faithfully, but this does not relieve other Federal agencies of the fiduciary duty to act with the utmost care, good faith, and prudence where Indian trust rights are concerned or potentially affected. Nor does this relieve the agencies of the duty to provide those services necessary for protection and enhancement of those rights. Many examples of the conflict of interest are cited in the Commission task force reports. This conflict is particularly obvious when Indians attempt to secure adequate legal representation to protect their trust interests.[28]

SCOPE OF TRUST OBLIGATION

The Department of the Interior adopts a very narrow interpretation of the trustee concept by limiting its application to the lands, natural resources, and mangement of trust funds of "federally recognized" tribes.[29] There is little reason to so restrict the trust doctrine other than administrative convenience. There is legal authority that the United States trust duty is much broader.[30] The purpose behind the trust is and always has been to insure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society. This duty has long been recognized implicitly by Congress in numerous acts, including the Snyder Act of 1921,[31] the Indian Reorganization Act of 1934,[31a] the Johnson-O'Malley Act of 1934,[32] the Native American Programs Act of 1974,[33] the Indian Self-Determination and Education Assistance Act of 1975,[34] and the Indian Health Care Improvement Act of 1976.[35] In fact as early as 1818 Congress established a general civilization fund to aid Indians in achieving self-sufficiency within the non-Indian social and economic structure.[36]

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[25] *See* AIPRC, Task Force No. 2, ch. 1, and see ch. 5, part A.3 of this report.

[26] *See* AIPRC, Task Force No. 9, 734–760; AIPRC, Task Force No. 3; R. Chambers, note 3 *supra*.

[27] *See* generally, F. Cohen, Handbook of Federal Indian Law, 171–172 (1941) and cases cited therein.

[28] *See* generally, AIPRC, Task Force No. 9, part 6, ch. 10.

The Commission has found that Indian people are unanimous and consistent in their own view of the scope of the trust responsibility. Invariably they perceive the concept to symbolize the honor and good faith which historically the United States has always professed in their dealing with the Indian tribes. Indian people have not drawn sharp legal distinctions between services and custody of physical assets in their understanding of the application of the trust relationship. Consequently, at its core, the trust relationship has meant to them the guarantee of the U.S. that solemn promises of Federal protection for lands and people would be kept. The fact that the United States has been notoriously unfaithful in observing its commitments to the Indian tribes is not seen as lessening the continuing responsibility. In this context the range of social services which the United States has traditionally provided and for which successive Congresses have appropriated funds (for example, see the above list of statutes) have always been seen as an integral part of the Federal-Indian relationship.

Notwithstanding this common perception of the scope of the trust responsibility, an analysis of the implications of its meaning on a level of practical application logically forces us to make a broad distinction between the protection of physical trust assets and the commitment to provide human services. This distinction is particularly relevant in view of the Commission recommendations articulating a standard of care, remedies for breach of trust, and the necessity for procedural protections to accompany condemnation of trust interests. As the above analysis makes clear, these principles have evolved in the course of judicial analysis of the trust responsibility, which have found the common law principles of trust to be an appropriate frame of reference. Essentially, the courts have found that trusteeship without standards, remedies, or procedural protections borders on being meaningless and unenforceable. It is important to note that these court decisions have all arisen in the context of the trust responsibility as applied to physical assets. The principles of law derived from common law trust doctrine are readily applicable to the trust relationship as it affects the United States' stewardship of Indian trust assets. The identification and formulation of standards of care, remedial devices, and procedural protections by the Commission have only followed this development in the law as found in Federal judicial decisions.

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[29] U.S. Congress. House Comm. on Appropriations, Subcomm. on the Dept. of Interior and Related Agencies. Hearings on BIA Appropriations, 102 et seq. (94th Cong., 1st sess., 1976) ; see also U.S. Dept. of Interior, Office of the Secretary, Letter from Acting Secretary Kent Frizzell to David Getches, Oct. 27, 1976.

[30] *See* AIPRC, Task Force No. 1 ; Task Force No. 8 ; also R. Chambers, note 2, supra.

[31] 25 U.S.C. sec. 13.

[31a] 25 U.S.C. sec. 461 et seq.

[32] 25 U.S.C. sec. 452.

[33] 88 Stat. 2323.

[34] 88 Stat. 2203.

[35] P.L. 94–437.

[36] *See* ch. 8, this report.

The trust relationship as applied to the broader concepts of human services and supportive Indian tribal government calls for a different, though parallel, line of reasoning. That is, the principles of law so readily applicable in reference to the intangible responsibilities of providing services and respecting right of self-government. It is a matter of a difference in form, which calls for a difference in application. The Federal responsibility to provide services and to support the right of self-government is no less of a trust responsibility simply because the manner of application is distinguishable. The social and governmental trust, which is more nearly analogous to the guardian-ward principles, is clearly no less of a binding responsibility and is certainly understood to be on the same level by Indian people.

The precise manner in which these obligations are fulfilled in terms of magnitude and distribution may be changed by Congress as the relative strength and self-sufficiency of Indian tribes change. But the federal duty to provide them remains constant. Furthermore, the nature and degree of services provided by the Federal Government pursuant to the trust obligation is not altered by the services which Indians may receive on the same basis as other United States citizens or governmental units. This follows from the dual-entitlement concept whereby Indians, pursuant to equal protection of the laws, have a right to receipt of general government services on a nondiscriminatory basis and also a right to those services offered specifically to Indians as a distinct group of citizens.

It must be pointed out that the special "Indian" services have never resulted in double benefits nor have they been understood as such by Indian people. The congressional purpose in providing Indian services has always been to meet the minimal human service needs of Indian communities where general government services have been unavailable. However, the Commission has found that in many instances Indians have been declared ineligible for general government services due to a pattern of misunderstanding of the effect of dual entitlement by government officials with the result that too often Indians have received no services. In chapter eight of this report, the Commission calls for congressional oversight hearings to investigate this problem.

It should be noted that the trust obligation extends not only to tribes as governing units but also to their members wherever they may be.[37] There is nothing in the law which holds that the Federal trust responsibility stops at the reservation gate, nor do sound policy considerations dictate such a result. On the contrary, consistency and fairness demand just the opposite. Moreover, the trust duty of the U.S. Government is not affected one way or the other by the delivery or nondelivery of Federal social service programs in urban and other nonreservation settings or by the Federal choice of delivery vehicles. The trust obligation is unique and independent of other Government activities.

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[37] *United States* v. *Holliday*, 70 U.S. 407 (1865); *Seminole Nation* v. *U.S.*, 316 U.S. 286 (1942); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973).

Congressional Guidance Required

Congress has often contributed to the misunderstanding of the U.S. trust responsibility and has sometimes inadvertently prevented Federal agencies from administering it in the best interests of the Indians. This results because Congress has not always given sufficient guidance to executive agencies as to what is expected of them in carrying out these responsibilities. Furthermore, inadequate appropriations for Indian programs indirectly encourage agencies to restrict eligibility for their trust services, contrary to both the purposes and the rationale for the Federal trust relationship. Given the dramatic significance of the trust responsibility in Federal-Indian relations, and the plenary power of Congress in Indian matters,[38] there is little reason for leaving the doctrine to founder in judicial and administrative guesswork and budgetary juggling. Therefore, the Commission concludes that Congress is the appropriate forum for discussion of the trust relationship.

Should the Trust Be Specifically Defined?

There was considerable discussion in and outside the Commission as to the relative merits of two alternative approaches to recommended legislation dealing with the trust responsibility:

(1) A detailed definition;
(2) A general statement of policy.

The argument for the first alternative was that such a definition would clarify legal rights under the concept, give day-to-day guidance to executive agencies carrying out the trust and diminish the inconsistencies in administrative and Federal court decisions as to how the trust translates into affirmative duties and rights in Indian law.

The argument against a precise definition of the trust obligations with an enumeration of specific rights and obligations is that the Federal trust responsibility is a continually evolving concept. This argument suggests that a general affirmation of the trust responsibility by Congress would not place undue restrictions on the development of this doctrine but still would constitute an explicit recognition of the scope of the obligation by Congress.

The Commission has taken the middle ground between these alternatives and elected not to offer a detailed definition of trust responsibility because such a definition offered today could become obsolete and unmanageable as the nature and functions of tribal governments evolve, as the role which Indians play as United States citizens changes, and as the relationship between the Federal Government and tribal governments responds to new realities and demands. In such circumstances, a specific legal definition of the trust relationship could in time be a hindrance to Indian self-government and economic improvement.

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[38] *United States* v. *McGowan*, 302 U.S. 535 (1938); *Warren Trading Post* v. *State Tax Commission*, 380 U.S. 685 (1965). For discussion of the plenary power, see AIPRC, Task Force No. 9, 32–35.

Likewise, we elected not to recommend a simple, broad reaffirmation by Congress that there is such a concept as a trust responsibility. Congress has recognized implicitly the special obligation of the United States to American Indians in many statutes. The Federal courts have recognized and given substance to the trust duty for more than 150 years.[39] And various sectors of the executive branch do specifically recognize the trusteeship.[40]

Despite this recognition, the trust duty remains somewhat fuzzy, poorly administered, and a matter of some disappointment to Indians who read Federal court statements that the trust responsibility involves "moral obligations of the highest responsibility and trust" and is to be "judged by the most exacting fiduciary standards," [41] then try to perceive those obligations being met. As a rule, Indians cannot see the performance of the promise.

The Trust Concept Is a Constantly Evolving Doctrine

The recommendations constitute a "definition" in that they set out more clearly than previous congressional actions what the trust duty is, who owes it and to whom, and what the standards should be for judging performance. But they have purposely restricted statements of these elements to broad principles.

This approach is desirable because, much like the principles and rights contained in the U.S. Bill of Rights, the United States trust responsibility is a constantly evolving legal concept. To a great extent, this flexibility in meaning accounts for the continued vitality and relevance of these legal determinants, despite the enormous political and social changes witnessed in the 200-year history of the United States. The principles contained in the Bill of Rights and those inherent in the trust relationship with Indians should be allowed that flexibility.

It should be noted that there is considerable support in statutory, judicial, and constitutional law for the congressional declaration set forth below. Consistent with Supreme Court mandates, these sources have been read in favor of Indians, and as Indians would have understood them.[42]

Development of a Sound Trust Policy

The first paragraph of the recommended policy statement (A1 below) proposes an explicit recognition that the trust obligation is linked historically to protection of Indians and Indian tribes in three areas: (1) trust resources, including lands, natural resources, and trust funds; (2) services related to the economic and social well-being of the Indian people; and (3) the right to self-government. With respect to services related to protection and enhancement of trust assets, the United States should be held to the standards of a common law trustee as discussed in the narrative above, and it should be subject to liability in Federal courts for violation of this trust obligation. In the absence of such a remedy there is no incentive for the trustee to perform its obligation in a diligent manner.

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[39] For example, *Worcester* v. *Georgia*, 31 U.S. 515 (1832) and more recently *Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370 (1st cir., 1975) affirming 388 F. Supp. 649 (D.C. Me., 1974).

[40] E.g., message from President Nixon to Congress, the American Indians—Message from the President of the United States, 116 Cong. Rec. 23131, 23132 (1970) ; also 1976 Appropriations Hearings, note 28 supra.

[41] *Seminole Nation* v. *United States*, 316 U.S. 286. 296 (1942).

[42] For a thorough discussion of the case law setting forth this rule of interpretation, see AIPRC, Task Force No. 9, pt. I, ch. 1, sec. C.

In matters relating to possible liability for failure to protect rights of self-government or to provide social and economic services, the courts have not spoken. Certainly it is possible that events such as the diminishment of the governmental capacities of the tribes in matters such as the power to regulate hunting and fishing activities could lead to significant monetary losses. The Commission recommendations set forth below would not preclude legal actions either for monetary damages or for injunctive relief in either of these areas.

The second paragraph (A2) reaffirms Federal court holdings that the trust duty is not one which applies only to the Bureau of Indian Affairs or another "Indian agency." Federal agencies may not be required to establish special Indian programs, but they are required to act consistent with fiduciary standards when they take actions which may affect Indian trust property.

The third paragraph (A3) makes it clear that the Federal trust responsibility extends to members of Indian tribes but is not limited to Indians living on reservations. The last sentence merely reaffirms the rights of Indians to those services offered to all United States citizens and to those offered specifically to American Indians. Eligibility for receipt of one does not preclude eligibility for receipt of the other.

The fourth paragraph (A4) emphasizes that Indian lands are not public lands. They are privately owned lands held in trust by the United States for Indians. It should be unnecessary to state this in a congressional policy except that it is a legal fact which sometimes still is misunderstood. For example, as recently as 1972, the U.S. Court of Appeals for the Tenth Circuit identified Indian trust lands as "public lands," thereby subjecting them to more stringent environmental protection rules than other private lands.[43]

The recommendation of an Indian rights impact statement contained in section B below follows from two premises: (1) Federal agencies have in the past and today continue to violate Indian trust rights; and (2) a procedure should be established which would prevent such violations without consent of the Indians or specific authorization of Congress. The need for such an Indian rights impact statement is fully discussed in the final report of Task Force Number Nine, pages 62–70. Among other specific instances listed is the conflict between the Seneca Indian Nation and the Army Corps of Engineers in which the tribe lost in excess of 80 percent of its reservation without specific congressional authorization.

Under our proposal, prior to taking any action which may abrogate or otherwise infringe on Indian trust rights, Federal agencies must first seek consent from the affected Indians and obtain authorization from Congress. Under part 2 of section B below Congress will not authorize such action absent Indian consent except under "extraordinary circumstances where a compelling national interest requires" it. In any case, the congressional authorization must identify the specific Indian rights being affected and that it is the intent of Congress to "abrogate or infringe such rights." It is implied in this procedure that the appropriate Indians and Federal agencies will receive copies of the impact statement and be permitted to comment on its contents.

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[43] *Davis v. Morton;* 469 F. 2d 593 (10th cir., 1972).

Because of the conflict of interest problems, frequent refusal by the Department of the Interior and the Department of Justice to represent tribes or individuals involved in trust issues, and limited resources of the tribes to employ their own attorneys, Indians are often unable to secure adequate legal representation to protect or enforce their rights under the Federal trust responsibility.[44] And even when they are able to litigate, the enormous expense involved depletes tribal resources and hinders delivery of needed services. The recommendations in section C below are intended to alleviate this situation by creating a new office with litigation authority and providing for government payment of fees for private attorneys representing Indians in trust matters. Nothing in this section, however, affects the right of tribes to engage counsel on their own behalf.

Section C recommends that within a new Department of Indian Affairs, which is recommended elsewhere in this report (see chapter six), there be established an Office of Trust Rights Protection. It may be part of a general counsel's office in the department or it may be a separate entity. In either location, it would assume a role as the primary legal advocate in the Federal Government for protecting and enforcing Indian rights pursuant to the Federal trust responsibility. With Indian consent, it would provide legal guidance in trust matters, initiate and participate in administrative proceedings affecting Indian trust rights and prepare and try Indian cases in Federal and State courts. The Department of Justice would have a secondary duty to handle such matters upon request of the Office. Upon establishment of the Office, the function of the Division of Indian Affairs of the Solicitor's Office in the Department of Interior would be transferred to the new office.

This approach to relieving the conflict of interest problems so troublesome with the present structure for providing legal assistance to Indians presupposes the creation of a Department of Indian Affairs. In the absence of such action, it is the recommendation of this Commission that some entity like the proposed Indian Trust Counsel Authority[45] be established.

The difficulty with the Trust Counsel concept as proposed is that: (1) it does not go far enough to diminish conflict of interest situations; (2) the distribution of responsibility between the Authority, the Department of the Interior and the Department of Justice was confusing; (3) the proposed staff of the Authority was too limited to adequately handle the potential caseload; and (4) because of the absence of field offices, communication between Indians seeking legal assistance and the Authority would be cumbersome. Even still, the idea would lead to an improvement of the current situation in that Indians would have at least some alternative besides the Department of Justice with its inherent conflict of interest.

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[44] For an excellent discussion of specific cases of inadequate legal representation for Indians and the reasons for it, *see* pt. VI, ch. 9 of the Final Report of Task Force No. 9.

[45] *See* Hearings on the Proposed Indian Trust Counsel Authority, note 4 supra.

The advantage of establishing a legal office with litigation authorization in an independent Indian agency is that it would have readily available the expertise and manpower of the parent agency; it could place legal staff in the various field offices of the agency thus facilitating communication with Indian clients; and it would lessen the risk of severe reductions in appropriations which would drastically reduce the effectiveness of the legal office as an advocate of Indian trust rights.

A recent Supreme Court decision strengthened the general rule in Federal courts that the prevailing party in litigation is not entitled to an award of attorney's fees by the court in the absence of statutory authorization or other exception.[46] This rule, however, is subject to revision or exception by Congress and numerous current statutes provide for such exceptions.[47] Recommendation D, below, is intended to provide an additional exception in the case of Indians involved in litigation. For an excellent and thorough discussion of the need for such legislation and the consequences of the current practice, see part 6 of the final report of Task Force No. Nine.

RECOMMENDATIONS

To clarify and improve the administration of the Federal trust responsibility to American Indians, the Commission recommends that:

Congress reaffirm and direct all executive agencies to administer the trust responsibility consistent with the following principles and procedures.

A. STATEMENT OF POLICY

In carrying out its trust obligations to American Indians (including Alaskan Natives) it shall be the policy of the United States to recognize and act consistent with these principles of law:

1. The trust responsibility to American Indians is an established legal obligation which requires the United States to protect and enhance Indian trust resources and tribal self-government and to provide economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.

In matters involving trust resources, the United States be held to the highest standards of care and good faith consistent with the principles of common law trust. Legal and equitable remedies be available in Federal courts for breach of standards.

2. Although the trust responsibility is a legally binding duty required of all United States agencies and instrumentalities, and although Congress has the ultimate responsibility for insuring that the

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[46] *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240.

[47] For a list of such statutes, *see* footnote 9, part VI, ch. 9 of the Final Report of Task Force No. 9.

duty is met, there be in the executive branch one independent prime agent charged with the principal responsibility for faithfully administering the trust.

3. The trust responsibility extends through the tribe to the Indian member, whether on or off the reservation. His or her rights pursuant to this United States obligation are not affected by services which he/she may be eligible to receive on the same basis as other United States citizens or which the tribe may be eligible to receive on the same basis as any other governmental unit.

4. The United States holds legal title to Indian trust property, but full equitable title rests with the Indian owners.

B. INDIAN TRUST RIGHTS IMPACT STATEMENT

Limitation Upon Agency Action

Before any agency takes action which may abrogate or in any way infringe any Indian treaty rights, or nontreaty rights protected by the trust responsibility, it prepare and submit to the appropriate committee in both Houses of Congress an Indian trust rights impact statement, to include, but not be limited to, the following information:

1. Nature of the proposed action.
2. Nature of the Indian rights which may be abrogated or in any way infringed upon by the proposed action.
3. Whether consent of the affected Indians has been sought and obtained. If such consent has not been obtained, then an explanation shall be given of the extraordinary circumstances where a compelling national interest requires such action without Indian consent.
4. If the proposed action involves taking or otherwise infringing Indian trust lands, there must be notification whether or not lieu lands have been offered to the affected Indian or Indians.

Action by Congress Required

When considering legislation which may have an adverse impact upon treaty or nontreaty rights of Indians the Congress adhere to the following principles.

The United States not abrogate or in any way infringe any treaty rights, or nontreaty rights that are protected by the trust responsibility, without first seeking to obtain the consent of the affected Indian or Indians. Such rights not be abrogated or infringed without such consent except under extraordinary circumstances where a compelling national interest requires otherwise. With or without Indian consent, such rights not be abrogated or infringed upon in any way except pursuant to a congressional act which identifies the specific affected Indian rights and which states that it is the intent of Congress to abrogate or infringe such rights.

C. LEGAL REPRESENTATION FOR INDIANS

To diminish the conflict of interest prevalent when the Department of Justice and the Department of the Interior provide services to Indians, to provide for more efficient rendering of legal services to Indians, and to otherwise improve the representation which Indians receive for protection and enforcement of their trust rights, Congress enact the following legislation:

1. There be established within a newly created Department of Indian Affairs (*see* recommendation in chapter six) an Office of Trust Rights Protection. Its duties shall include, but not be limited to, cataloging and assisting in the management of Indian trust property, advising Indians and Indian tribes in legal matters and representing them in all litigation and administrative proceedings involving Indian trust rights. In appropriate field offices of the Department of Indian Affairs there be a legal and professional staff under the supervision of the Office of Trust Rights Protection.
2. The Office of Trust Rights Protection be authorized to render all appropriate legal services which now are rendered by the Department of Justice and the Department of the Interior, provided that the Indian client agrees to accept representation and services.
3. The Office of Trust Rights Protection have the primary responsibility of the Federal Government for protecting, enforcing, and enhancing Indian trust rights, but this shall not relieve any Federal agency from the duty to recognize and act consistent with the Federal trust responsibility for Indians.
4. The Office of Trust Rights Protection act in the name of the United States as trustee for Indians in all legal matters and proceedings, except those which it refers to the Department of Justice for litigation. It have the discretion to so refer those matters for which it does not have the staff, resources, or expertise to handle. The Office also have the discretion and authority to engage private legal counsel to represent Indians, tribes or groups in trust matters. In such cases, the United States Government may pay all fees and costs and the wishes of the Indian clients shall be complied with, as much as possible, in the selection of counsel. Where there is conflict of interest between an individual Indian and a tribe involving trust issues, the Office represent the tribe and it have the discretion to engage private counsel to represent the individual at Government expense.
5. The United States waive sovereign immunity for all actions involving Indian trust matters brought by the Office of Trust Rights Protection or private counsel engaged by it to represent Indians.
6. The Office be authorized to obtain whatever information, services, and other assistance deemed necessary from other Federal agencies, and such agencies be obligated to comply with such requests.

D. AUTHORIZATION FOR AWARD OF ATTORNEY FEES AND OTHER LITIGATION COSTS

Federal courts be authorized to award attorneys' fees and expenses and all reasonable costs incident to litigation, including but not limited to expert witness fees, in cases in which an Indian or Indian tribe or group engages private attorneys and is successful in protecting or enforcing treaty, trust, or other rights protected by Federal statute. Federal courts be given the discretion to order that all such fees and costs be paid by the losing party or by the United States Government.

CHAPTER FIVE

TRIBAL GOVERNMENT

Simply put, the question is whether tribes are going to be permanent, on-going political institutions exercising the basic powers of local government or whether they are to be transient bodies relegated to mere "service delivery vehicles" for federal assistance programs; mere "federal instrumentalities" for the control of the social behavior of their own tribal membership pending their ultimate assimilation into the dominant society which surrounds them. This is the fundamental question for the future of Indian tribes and the fundamental question which the Congress must resolve in the formulation of the future course of Federal Indian policy.

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CHAPTER FIVE

TRIBAL GOVERNMENT

FUNDAMENTAL ELEMENTS OF TRIBAL GOVERNMENT

A. HISTORICAL OVERVIEW AND JURISDICTION GENERALLY

Federal policy toward tribal government should be directed toward affirming and encouraging the development of tribal governments into strong, viable, permanent governmental institutions. Litigation surrounding the jurisdictional conflicts between States and tribes may suggest the desirability of a legislative solution. But it is the consensus of this Commission that any attempt to impose a broad legislative solution at this time would be ill-advised and premature.

The Commission finds that the growth and development of tribal government into fully functioning governments necessarily encompasses the exercise of tribal jurisdiction over non-Indian people and property within reservation boundaries. There are limits, of course, and tribes must operate under the assumption that the jurisdiction they assert over non-Indians must bear a reasonable relationship to legitimate tribal interests such as protection of trust resources, maintenance of law and order, delivery of services, and protection of tribal government generally.

Accordingly, the Commission finds that the following three principles should serve as the basis for the Federal-tribal-State relationship.

Federal policy concerning tribal sovereignty must be premised on an assumption that when confronted with options, the Indian people will act intelligently, responsibly, and fairly when exercising powers of self-government. The suspicion and resentment which presently characterize the relations between the tribes and States must be eliminated within the context of respect and acceptance of the institutions of tribal government and Federal laws must be designed to foster this result.

With the increased power and responsibility of tribal governments, some Federal review authority will be imposed. The Federal policy must accept the position that the supervisory authority it asserts must be limited and flexible. This authority is now encompassed in title II of the 1968 Civil Rights Act (Indian Civil Rights Act).

The ultimate objective of Federal-Indian policy must be directed toward aiding the tribes in achievement of fully functioning governments exercising authority within the boundaries of the respective reservations. This authority would include the power to adjudicate civil and criminal matters, to regulate land use, to regulate natural resources such as fish and game and water rights, to issue business licenses, to impose taxes, and to do any and all of those things which all local governments within the United States are presently doing.

Historical Development of Tribal Government

Tribal government today is at a crossroads of history. Simply put, the question is whether tribes are going to be permanent, on-going political institutions exercising the basic powers of local government or whether they are to be transient bodies relegated to mere "service delivery vehicles" for Federal assistance programs; mere "Federal instrumentalities" for the control of the social behavior of their own tribal membership pending their ultimate assimilation into the dominant society which surrounds them. This is the fundamental question for the future of Indian tribes and the fundamental question which the Congress must resolve in the formulation of the future course of Federal-Indian policy.

Today we find basic questions being asked about the definition of terms such as "Indian", "tribe" and "reservation". We find expressions of concern over the fact that tribes are "sovereign", and protests over the fact that tribes are beginning to exercise governmental authority over non-Indians. There is even concern over the fact that not all tribes are organized on the same democratic principles that have governed the formation of the Anglo-American political structures.

There are complaints that one sovereign cannot exist within the boundaries of another sovereign—an argument advanced by the State of Georgia in the 18th century. This argument led directly to the westward removal policies of the 1830's with the agreement set forth in treaties that the newly established reservations in the West should never be included within the boundaries of any State or territory. The argument, even today, surfaces in occasional State court decisions despite repeated Supreme Court decisions, since 1834 to the present, reaffirming the sovereignty of Indian tribes.

There are also complaints that people should not be subjected to the authority of government in which they are not allowed to participate—a complaint with a solid patriotic ring but one which does not reach the core of the problem of government in Indian country; it overlooks the history of Federal policy which opened the Indian lands for non-Indian settlement against the wishes of the Indian community and in violation of the treaty agreements. The argument also brushes aside the moral and legal obligations of the United States to protect and foster the development of tribal government. Both of these arguments if decided in a manner favorable to the non-Indian complainants would inevitably result in the reduction of tribal government to a point where it could truly be said that Indian tribes are mere associations of private property owners having no more authority than any voluntary association.[1]

The position in which tribes find themselves today is a direct outgrowth of continual conflict and vascillation of Federal-Indian policy and the failure of the United States to honor the numerous commitments made to Indian tribes in treaty negotiations. These policies are discussed at length in the historical chapters of this report. They are also treated at some length in the report of Task Force No. Nine (part III). The evolution of the legislative and administrative policies of the Federal Government are given detailed attention in chapters 2 and 4 of the Handbook of Federal Indian Law (Cohen, 1940) prepared under the auspices of the Department of the Interior. Nevertheless, to place this chapter on tribal government in perspective, it is necessary again to review summarily the history of Federal-Indian relations and the role of tribal government in this evolutionary process.

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[1] Such a finding was made by the 10th circuit in *U.S. v. Mazurie*, 487. F. 2d 14 (10th cir., 1973). It was rejected by a unanimous Supreme Court on appeal 417 U.S. 544 (1975).

Early History

The legal basis for the concept of tribal sovereignty and of Indian country on Indian reservations springs from treaty negotiations between the United States and the various Indian tribes on our Western frontier. The primary cause of war between the European settlers and the Indian tribes centered on the continual encroachment of the non-Indian populace upon lands claimed by the Indian people. At the time the process of treaty negotiation and purchase of land was instituted, the Indian tribes constituted formidable forces with whom the great powers such as England, France, Spain, and the United States sought formal alliances in their continuing conflicts among themselves over territorial claims in North America.

There were three primary benefits sought by the United States in these treaty negotiations: (1) acquisition of lands for the burgeoning population of non-Indian settlers; (2) loyalty of the tribes to the United States as opposed to the other European powers; and (3) peace on the frontiers by having clearly defined boundaries of lands claimed by the Indian tribes. The primary benefits which the Indian tribes sought were: (1) a recognition by the United States of their exclusive right to the use and occupancy of a well-defined area; and (2) a commitment from the United States to defend and protect their rights within that area from non-Indian encroachment.[2]

The thrust of these treaties was that the tribes were expected to maintain order among their subjects to prevent depredations against non-Indians and were obligated to turn over to the United States for punishment bad men among them who committed wrongs against non-Indians. The United States, for its part, was expected to maintain order among its subjects and punish non-Indians for wrongs committed against Indians. The negotiations and the agreements were entered into as one sovereign nation to another. The principles underlying this basic relationship were described by Secretary of War Henry Knox to President George Washington in a report to the President dated July 7, 1789, evaluating the military situation on the frontiers and recommending adoption of the above course of action as the most feasible, the least expensive and the most honorable course of action for the United States in its dealing with the Indian people.[3] Legislation through 1834 was premised on the policy positions laid down in that report.[4] For the most part, the Indians kept their end of the bargain. It goes without saying that for the most part, the United States did not keep its end of the agreements.

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[2] Many excellent books have been written on the subject of early Indian relations. Two of note are "American Indians Policy for the Formative Years" by F. Prucha (Harvard Univ. Press, 1962) and "The Invasion of America—Indians, Colonialism, and the Cant of Conquest" by Francis Jennings (Univ. of N.C. Press, 1975).

[3] American State Papers, Indian Affairs, vol. 1, pp. 52–53.

[4] Act of June 30, 1834, ch. 161, 4 Stat. 729. See F. Cohen, Handbook of Federal Indian Law (1940 ed), ch. 4.

Two basic concepts emerged out of this course of dealing: (1) that while the United States claimed ultimate sovereignty over all lands within its territorial limits, the Indian people had ownership interests in the lands under their control, that this land was held in common ownership of the tribe, and that this land could only be acquired from or taken from the tribes by purchase or conquest; and (2) a recognition that Indian tribes were sovereign governments—a recognition that the tribal government, the tribal leaders, had the capacity and the authority to impose rules or laws to control the actions of individuals, particularly Indian people, within the boundaries of the lands under their jurisdiction, and a recognition that those Indian governments or leaders had a right and power to convey title to the property under their control.

These basic conceptions received judicial recognition in three landmark Supreme Court decisions.[5]

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation", so generally applied to them, means, "a people distinct from others". The Constitution by declaring treaties already made, as well as those to be made, to the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.
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> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia, have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.[6]

In 1830, Congress passed the Westward Removal Act[7] authorizing the President to negotiate with Indian tribes for their removal westward. Despite passage of this Act, it is clear that Congress shared the perceptions of Justice Marshall with respect to the treaty obligations owed the Indian tribes and recognized the inherent governmental authority of the tribes within Indian country. The Final Indian Trade and Intercourse Act was passed in 1834.[8] Section 25 of that Act (what is now known as the General Crimes Act codified as 18 U.S.C. 1152) extended to the Indian country the Federal criminal laws which were applicable within federal enclaves under the sole and exclusive jurisdiction of the United States. In issuing its report on that legislation, the House Committee on Indian Affairs stated:

> It will be seen that we cannot, consistently with the provision of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction; and it is rather of courtesy than of right that we undertake to punish crimes committed in that territory by and against our own citizens. And this provision is

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[5] *Johnson* v. *McIntosh*, 21 U.S. (Wheat) 543 (1823); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[6] 31 U.S. (6 Pet.) at 558, 560, 561.

[7] Act of May 28, 1830, ch. 148, 4 Stat. 411.

[8] Act of June 30, 1834, ch. 148, 4 Stat. 411.

> retained principally on the ground that it may be unsafe to trust to Indian law in the early stages of their Government. It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits.[9]

It has been contended that the extension of Federal criminal law to the Indian country by section 25 of the Final Indian Trade and Intercourse Act ousted or preempted the jurisdiction of the tribes. This contention has been rejected by the courts.[10] At the time this law was enacted, treaties with tribes commonly provided that the tribes turn over "bad men" among them for punishment by the United States. This was in keeping with Secretary Knox's policy of placing the United States between the Indian tribes and the non-Indian people to act as a buffer. It would appear that this section should be read as an effort by the United States to comply with its treaty commitments to the tribes to punish offenses committed by non-Indians against Indians.

A companion bill to the Final Indian Trade and Intercourse Act would have provided for the establishment of an Indian State in the West. One feature of this bill is that it would have provided for tribal assumption of the enforcement of the laws set forth in the Final Indian Trade and Intercourse Act and enforce them in their own tribunals. In fact, the only restriction of the penal power of the tribe would have been with respect to the death penalty which would have been subject to review by an appointed Governor prior to execution.[11] It appears the basic concept of an Indian State was agreeable to the legislators, but the bill was opposed for other reasons and was not enacted. Later bills were also introduced but were resisted by the Indian tribes who considered such organization as a weakening of their own inherent authority.[12]

Westward Removal and Reservations

It has already been noted that the argument of the State of Georgia for extinguishment of the Indian title to lands and the abolition of tribal government within her boundaries was premised on the theme that it was not possible for one sovereign to exist within the boundaries of another sovereign. To preclude the repetition of any such claims in the future, the treaties negotiated with the tribes removed westward specifically provided that the lands reserved to them in the treaties should never be included within the bounds of any State or territory. This provision became "boiler plate" language included in many of the treaties negotiated with Indian tribes over the next years. It also led directly to the inclusion of "disclaimer" clauses which appear in the territorial and State enabling Acts and constitutions.[13]

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[9] House Report No. 474, 23d Cong., 1st sess., June 20, 1834, p. 13.

[10] *Oliphant v. Schlie*, No. 74-2154 (9th cir., decided Aug. 24, 1976).

[11] House Report No. 474, 23d Cong., 1st sess., June 20, 1834.

[12] For an excellent treatise on the numerous bills proposed on this subject and the Indian resistance to them, see "The Formation of the State of Oklahoma" by Roy Gittinger (Univ. of Oklahoma Press, 1939).

[13] *See* Rev. Stats. §1839 cited in vol. I, Kappler's Affairs, Laws and Treaties, p. 3, and the Act of Jan. 29, 1861 (12 Stat. 126) admitting the State of Kansas into the Union in which it is provided that the lands reserved to the tribes by treaty should not be included within the territorial limits or jurisdiction of the State until the tribes assented to such inclusion. These disclaimer clauses and the evolution of State jurisdiction within Indian reservations is examined in an article entitled "Development of Tripartite Jurisdiction in Indian Country" by the Indian Civil Rights Task Force, vol. 22, No. 3 Kansas Law Review, (1974 ed.) pp. 351–385.

Despite the apparent respect which Congress, the Executive, and the courts manifested in this period toward the political and legal rights of the Indian tribes and nations, the relative power of the United States and the growing requirements for more and more land foreshadowed the Indian tragedy over the next 40 years. The massive influx of European immigrants, the gold rush to California, the development of a rail system capable of transporting the products of the West to the markets of the East doomed the Indian people to a reservation system imposed through military force. This upheaval and its social consequences are well developed in the historical chapter of this report.

One of the principal products of this period from the mid-1830's through the 1870's was the decline of the traditional tribal governments. This was particularly true for the plains tribes and the warlike tribes whose traditional way of life was drastically altered, who fell under the most direct military rule, and who were subjected to the most oppressive of regulations. It was probably less true of the nonnomadic tribes who remained in their traditional grounds and continued to survive through the same enterprises and the same cultural settings which had always sustained them. And it was particularly not true for the Five Civilized Tribes situated in Indian Territory (now eastern Oklahoma) who had tightly drawn treaties with the United States and whose governments and economies were similar to those of the States and territories, and of the Pueblos who appear to have been out of the mainstream of Indian administration at this time.

Allotment and Assimilation Period

By the end of the 19th century, Federal policy flowing from the Dawes Act of 1887 dictated that the solution to the "Indian problem" required that Indian reservations be broken up, that the communal holdings of the Indians be individualized into allotments in severalty, and that the governments of the tribes be terminated. For most Indian tribes, this policy was pursued through the land allotment process and through the overlay of administrative rules and regulations designed to stamp out the Indian way of life. The tribes in the Indian Territory presented a different problem. Their treaties with the United States were explicit, their governments and their economies were strong, and their reservation or national boundaries adjoined each other so it was not possible to simply "absorb" them within the boundaries of a State. The solution for these tribes lay in specific legislation. In 1898, Congress enacted the Curtis Act [14] stripping those tribes of most of their governmental powers, and in 1906 it enacted further legislation [15] to provide for the final disposition of the affairs of those tribes.

It is ironic that this period saw the demise of the strongest, most sophisticated Indian police and judicial systems, i.e., that of the Five Civilized Tribes, and also witnessed the birth of the tribal court system—originally an administrative device of the Bureau of Indian Affairs whose purpose at the time of its establishment was to control the activities of Indians within their reservations and aid in the suppression of their culture, but which has since been taken over by the tribes and now represents one of the most important manifestations of their sovereign power.

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[14] Act of June 28, 1898, ch. 517, 30 Stat. 495.
[15] Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

Indian Reorganization Act and Contemporary Legal Assumptions

In the period following the near termination of the Five Civilized Tribes, tribal governments lay relatively dormant. It was not until 1934 with the passage of the Indian Reorganization Act[16] that tribal government received any encouragement from the Federal authorities to reassert any governmental functions. The purpose of this Act, and its companion, the Oklahoma Indian Welfare Act of 1936, was to put an end to the allotment era; to restore to the Indian people an economically viable land base; to provide the Indian people with sufficient credit though a revolving loan fund that they might develop their own resources and business institutions; to recognize the rights of the Indian people to be self-governing; and to provide through the employment preference policy for eventual control by Indian people of the Federal agencies for protection of their resources and delivery of services to them.

In October 1934, immediately following passage of the IRA, the Solicitor's Office at the Department of the Interior issued an opinion discussing at length the powers of Indian tribes.[17] This opinion examined a multitude of issues including such topics as: (1) the origin of tribal authority and the rule by which its limits are determined, i.e., that except as Congress has expressly restricted or limited the internal powers of sovereignty vested in Indian tribes, such powers are still vested in the respective tribes; (2) the right of tribes to determine their own form of government; (3) the right of tribes to determine their own membership, except in matters where rights to "Federal" property are involved; (4) the right to control descent and distribution of non-trust property; (5) powers of taxation; (6) the power to exclude nonmembers from the territory subject to the tribes' jurisdiction; (7) police power of tribes over the property and contracts of its members; and (8) the powers of tribes in the administration of justice.

Contemporary with this opinion was another in February 1935, discussing the authority of the Secretary of the Interior to issue rules and regulations applicable in Courts of Indian Offenses to govern the conduct of Indians within reservation boundaries.[18] This opinion is particularly illuminating. It begins with the admission that there is no statute which vests the Secretary of the Interior with specific authority to "govern the conduct of Indians on the reservations or to promote law and order thereon in any way at all." The opinion, however, finds that the Secretary has the authority to promulgate rules and regulations governing the conduct of Indians because: (1) Congress has annually appropriated money for the support of a tribal police system; (2) the practice of Secretarial promulgation of such regulation is long standing and has never been challenged; (3) that the Secretary has a general duty to assure peace and tranquillity within Indian reservations; and (4) that Indian tribes have the inherent power to govern the conduct of their own members, and, due to the policies of the Federal Government which weakened those governments, it became necessary for the Secretary to assume the exercise of those powers in the absence of the tribe.

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[16] Act of June 18, 1934, ch. 576, 48 Stat. 984.

[17] Sol. Op. of Oct. 25, 1934 (55 Interior Decisions 14) entitled Powers of Indian Tribes.

[18] Sol. Op. of Feb. 28, 1935 (unpublished) entitled Secretary's Power to Regulate Conduct of Indians.

The contrast in the assumptions of the 1934 and the 1935 opinions is staggering. The first is strongly assertive of the inherent authority of the tribes; the second describes a social and governmental structure that had been brought to its knees through the conscious direction of Federal policy. The truth lies somewhere in between.

Out of these opinions and out of the history of our Federal policy, a policy which specifically stripped the most powerful tribal governments of their authority, i.e., the Five Civilized Tribes, and a policy which created administrative institutions in the name of the tribes to govern the conduct of the subjects of that bureaucracy—out of this history it is not surprising to find that the agency charged with the primary authority for the administration of Indian affairs should have conceived of the power of Indian tribes as being limited to the membership of their own tribes.

Post Indian Reorganization Act

The modern history of tribal government can probably be traced from the date of enactment of the Indian Reorganization Act of 1934. It is the history of an effort to struggle free of bureaucratic conceptions of limited tribal powers, a history of bureaucratic entanglement in the governmental process of the tribes, a history that saw tribes run the gamut of termination when extinction awaited the most successful, a history that saw the policies of the United States burst forth into social service and regulatory programs, many of which overlooked the fact of tribal existence, and yet a history which despite these incredible obstacles has found a judicial reaffirmation of the most important legal concept in Indian affairs, the sovereignty of the tribe, and a history which in recent years has seen the emergence of legislative programs truly designed to provide for genuine tribal self-determination. It is this history which brings us to the crossroads which Indian tribes and the United States Congress confront today.

The Indian Reorganization Act of 1934 and the Oklahoma Indian Welfare Act of 1936 manifested a positive attitude on the part of Congress toward Indian tribes and their development, but such outward manifestation was somewhat misleading. In 1937, Senators Wheeler and Frazier cosponsored a bill to repeal the 1934 Indian Reorganization Act.[19] The bill did not clear the committee. In 1943, the Senate Committee on Indian Affairs issued a "Partial Report" calling for the complete dismemberment of the Bureau of Indian Affairs, distribution of trust assets to individual Indians, and transfer of responsibility to the States.[20] In 1952, the House Committee issued a lengthy report supplying an overview of Indian affairs which called for, among other things, termination of the trust relationship with Indian tribes over a graduated period of time and dispersal of programs administered by the Bureau of Indian Affairs among other

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[19] S. 1736, 75th Cong., 1st sess.

[20] Senate Report No. 310, 79th Congress, 1st sess. (1943).

Federal agencies.[21] In 1953, Congress adopted H. Con. Res. 108 expressing its policy of favoring termination of the Federal relationship with the tribes.

The terminationist sentiments of Congress and the desire to get the Federal Government out of the Indian business manifested itself in the 1940's with passage of special legislation transferring jurisdiction over civil and criminal matters to specific States.[22] In 1952, Public Law 83–280 [23] was enacted providing a general authorization and providing a procedure for any and all States so desiring to extend their jurisdiction to Indian country and all Indians therein. This legislation did not require any consultation with the Indian tribes which might be affected.

Throughout the 1950's and into the early 1960's, the terminationist philosophy guided much of the Federal policy relating to Indian affairs. In 1953, Congress passed the Menominee Termination Act,[24] the first of many such termination acts. But despite this terminationist bent on the part of Congress, tribal government continued to function and judicial decisions relating to powers of Indian tribes again appeared in the pages of the legal reporters.

In a series of decisions between 1956 and 1961, it was held that Indian tribes are sovereign entities endowed with the power to establish courts and pass laws governing the conduct of their members; [25] that tribes have the power to impose taxes upon non-Indians using tribal property, a power free of the Fifth Amendment restraints applicable to non-Indian governments; [26] that tribes could enact legislation regulating the use of peyote in religious ceremonies and that First Amendment restraints were not applicable to Indian governments,[27] and that in the absence of compliance with Public Law 83–280, the courts of a State could not assert civil jurisdiction over an Indian for a transaction with a non-Indian which occurred within the boundaries of a reservation since such an assertion would constitute an infringement upon the rights of self-government.[28]

By the early 1960's, the concept of termination was in disrepute and was abandoned. For the first time, general Federal legislation relating to domestic assistance programs began to include Indian tribes and Indian reservations within their framework.[29] The number of Federal agencies involved in Indian affairs proliferated and through grants and contracts moneys became available to tribes which enabled them to devote substantially more time and attention to their governmental affairs.[30]

The question of tribal government and the relationship with State and Federal governments also came under congressional scrutiny. In 1961, the Senate Subcommittee on Constitutional Rights focused its attention on this subject, and in 1964 issued a report setting forth findings critical of the manner in which States had performed their obligations under Federal jurisdictional grants to them under Public Law 83–280.[31] That report also examined the law relating to the sovereign status of Indian tribes, noted the decisions holding that tribes were not subject to the restraints of the U.S. Constitution, and listed certain criticisms of the tribal and the BIA judicial systems. Finally, it strongly citicized the paternalistic control which the Department of the Interior exercised over tribal government through the process of requiring Secretarial approval over tribal codes and constitutions. Legislation was introduced in 1965 which, in revised form, was enacted into law in 1968.[32] This Act imposed broad statutory restraints upon tribal governments similar to but not identical with the Bill of Rights of the U.S. Constitution, provided for review of actions resulting in detention by Federal courts by way of habeas corpus,[33] restricted any further acquisition of jurisdiction over Indians and Indian country by States without first obtaining the consent of the tribes, and provided a means for State retrocession of jurisdiction to Federal authorities.

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[21] House Reports, vol. 8, No. 2503, 82d Congress, 2d sess., entitled "Investigation of the Bureau of Indian Affairs."

[22] Report of Task Force No. 4, pp. 8–9.

[23] Public Law 83–280, 83d Cong., 1st sess. (1953), 67 Stat. 588, codified as 18 U.S.C. 1162 and 28 U.S.C. 1360.

[24] Act of June 17, 1954, 68 Stat. 250.

[25] *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th cir., 1956).

[26] *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553 (8th cir., 1958).

[27] *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (10th cir., 1959).

[28] *Williams v. Lee*, 358 U.S. 217 (1959).

[29] Report of Task Force No. 9, part III, pp. 15–16; Schifter, "Trends in Federal Indian Administration", S. Dak. Law Rev., vol. XV (1970).

[30] Task Force No. 2 discusses funding sources of tribal governments at length.

Judicial decisions since 1968 have continued to adhere to the principles of earlier cases affirming the self-governing authority of Indian tribes and restricting the power which States may exercise within the boundaries of Indian reservations. Thus, in the absence of compliance with the governing Federal statute, States may not assume either criminal or civil jurisdiction over Indians for activities within Indian reservations,[34] their power to impose taxes on Indian-owned property is precluded,[35] they may not impose income taxes on income derived by an Indian from employment within a reservation,[36] and their power to impose sales taxes on Indian merchants within reservations is limited.[37] In addition, the States are generally without authority to regulate the manner in which Indians use their lands within reservation boundaries,[38] they have no authority over domestic relations of Indians within reservation boundaries,[39] and they are without power to impose their fish and game laws over Indians within reservations.[40]

While these decisions speak in terms of limitation of the power of State government, other decisions and administrative rulings issued since 1968 have moved to affirm tribal authority in such matters. Thus, it has been held that in the absence of some limitation found in the tribal constitution or laws, tribes may enforce their laws regulating hunting and fishing within the reservation.[41] Their power to authorize hunting or fishing either by Indians or non-Indians upon trust property within the reservation operates to the exclusion of State laws;[42]

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[31] Summary Report on Constitutional Rights of the American Indian (1964). *See also,* Task Force No. 4, ch. II D, pp. 15–24.

[32] Act of Apr. 11, 1968, 82 Stat. 77, 25 U.S.C. 1301 0 1343.

[33] In fact, the courts have held that their jurisdiction is much broader than just habeas corpus. See Task Force No. 4, pp. 129–150, and Task Force No. 9, pp. 40–45.

[34] *Kennerly* v. *District Court,* 400 U.S. 423 (1971).

[35] *Bryan* v. *Itasca County,* —— U.S. —— 96 S. Ct. 2102 (1976).

[36] *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973).

[37] *Moe* v. *Confederated Salish and Kootenai Tribes,* —— U.S. ——, 48 L. Ed. 2d 96 (1976).

[38] *Santa Rosa Band of Indians* v. *Kings County,* 532 F. 2d 655 (9th cir., 1975).

[39] *Fisher* v. *District Court,* —— U.S. ——, 47 L. Ed. 2d 106 (1976). *See* Task Force No. 4, pp. 85–87.

[40] Task Force No. 4, pp. 58–65.

[41] *Quechan Tribe* v. *Rowe,* 521 F. 2d 408 (9th cir., 1976). *See* Task Force No. 4, pp. 58–67.

[42] *Colville Tribe* v. *State,* No. C–75–146 (E.D. Wash., 1976); *Eastern Board of Cherokee* v. *North Carolina Department of Nat. and Econ. Resc.,* No. BCC 76–65 (W.D.N.C., 1976), appeal docketed 4th cir.

their power to assert criminal jurisdiction over non-Indians for activities within the reservation occurring upon trust land[43] and upon non-trust land[44] has been affirmed, and their power to impose taxes upon non-Indians users of trust assets has been reaffirmed.[45] Their authority to impose land use regulations upon scattered fee land situated within the reservation boundaries has been favorably reviewed and affirmed,[46] and the general authority of the tribes to assert civil jurisdiction over non-Indians for matters involving Indians within reservation boundaries has been affirmed in dicta by the Supreme Court.[47]

The exact parameters of the respective jurisdiction of States and tribes over people and property within the boundaries of Indian reservations has not yet been determined. Some of the cases noted above are still in the courts awaiting review, either at the circuit court or Supreme Court level. Other questions, particularly those relating to the power of States to impose leasehold interest taxes and other regulatory laws such as zoning, environmental controls, business licensing, etc., upon non-Indian lessors of trust lands of Indians, are also under challenge.

Summary

The question of jurisdiction of tribal governments has grown increasingly complex in recent years. Tribal governments are emerging from an essentially dormant period forcibly imposed upon them by Federal policies directed toward their ultimate destruction. The tribes are beginning to assert those governmental powers necessary to take their proper place in the role of governments within the United States. The powers they are seeking to assert are no more and no less than those of any local sovereign of these United States. The objectives they seek to attain are peace and tranquillity within the reservation boundaries and economic independence which will permit them to operate free of the Federal purse strings without fear of termination.

Numerous problems confront the tribes in this effort. The claimed authority of the Secretary of the Interior to pass judgment upon the validity of powers claimed by the tribes has prevented them in the past from obtaining judicial determination of their rightful authority. The continued indifference and ignorance of Federal agencies which sprang into existence at a time when tribal government was at its weakest has caused a host of laws to be written which conflict with the inherent governmental authority of tribes.

The resolution of these issues is complicated by the varying land distribution patterns within the different reservations, the difference in physical, economic and human resources between small tribes and large tribes, differences in the availability and value of natural resources over which the various governments are contending for control, and differences in proximity to large metropolitan areas.

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[43] *Oliphant* v. *Schlie*, No. 74–2154 (9th cir., 1976). Petition for certiorari has been filed with the Supreme Court.

[44] *Belgarde* v. *Morton*, No. C–74–6835 (W.D. Wash., 1975), appeal pending 9th cir. No. 75–3319. This case may be consolidated with *Oliphant* before the Supreme Court. The 9th circuit has stayed proceedings awaiting the decision on the petition of cert. filed in *Oliphant*.

[45] Sol. Op. dated Oct. 13, 1976, to the Sec. of Interior.

[46] Ibid.

[47] *U.S.* v. *Mazurie*, 419 U.S. 544 (1975). See also Task Force No. 4, pp. 89–94.

Conclusions

There is an established legal basis for tribes to exercise jurisdiction over non-Indians.

There has been a demonstrated need for the exercise of some tribal jurisdiction over non-Indians within Indian reservations.

The multiplicity of circumstances and variance in resources and capabilities of the tribes makes it undesirable that Congress attempt to impose a uniform solution to the jurisdictional authority of Indian tribes.

The administrative decisions, the judicial opinions and the authorities of tribes thus far asserted reflect a conservative approach to defining the parameters of jurisdiction and authority of tribal governments and that such case by case determination is preferable to attempting any legislative solution.

The provisions of the 1968 Civil Rights Act supply safeguards and remedies to persons aggrieved by actions of tribal government which are adequate to the concerns expressed by non-Indians at this time.

In the event any substantial problem arises in the future, the Congress has ample authority to impose whatever legislative solution may be required.

Recommendations

The Commission recommends that:

The long term objective of Federal-Indian policy be the development of tribal governments into fully operational governments exercising the same powers and shouldering the same responsibilities as other local governments. This objective should be pursued in a flexible manner which will respect and accommodate the unique cultural and social attributes of the individual Indian tribes.

No legislative action be undertaken by Congress in relation to tribal jurisdiction over non-Indians at this time.

B. SOURCES OF TRIBAL POWER

The powers of tribes derive from two sources, the first and by far the most important being the original sovereignty of the tribe; the second being the authority derived from their ownership of their lands.

Sovereignty

The sovereign authority of a tribe was first judicially recognized in *Worcester* v. *Georgia*,[48] a decision in which it was held that the laws of the State of Georgia could have no application within the boundaries of the Cherokee Nation, even though that Nation lay within the exterior boundaries of the State. The inherent sovereignty of Indian tribes has been repeatedly reaffirmed by the Federal Judiciary ever since that decision.

In *Ex Parte Crow Dog*,[49] it was held that neither Federal nor territorial laws pertaining to murder were applicable to an offense by one Indian against another Indian within Indian country, such an offense being by the laws of our Nation within the sole and exclusive jurisdiction of the Indian tribe. In *Talton* v. *Mayes*,[50] it was held that the requirements of the United States Constitution pertaining to the form of grand jury indictments were not applicable to procedures in the courts of the Cherokees since they were not a party to the Constitution, derived no authority from it, and were subject to none of its restrictions. In *U.S.* v. *Quiver*,[51] it was held that Federal laws pertaining to adultery could not be applied to an offense between an Indian and a non-Indian, jurisdiction over such conduct reposing solely in the tribe. In *Iron Crow* v. *Oglala Sioux*,[52] it was held that the tribal court of the Oglala Sioux Tribe was an arm of the sovereign tribal government, not an instrumentality of the Federal Government, and that as such a sovereign instrument, it had the power to apply the laws of the tribe and punish an Indian for the offense of adultery.

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[48] 31 U.S. (6 Pet.) 515 (1832).

[49] 109 U.S. 556 (1883).

In *Native American Church* v. *Navajo Tribal Council*,[53] it was held that the First Amendment of the U.S. Constitution was not applicable to the Navajo Tribe and the tribe was not barred thereby from enacting an ordinance banning the use of peyote in religious ceremonies. This decision described the legal status of an Indian tribe as being superior to that of a State since the tribe was not a party to the U.S. Constitution and had surrendered none of its powers to the central government under that document as had the States of the Union. In *Williams* v. *Lee*,[54] it was held that the courts of the State of Arizona could not assert jurisdiction over a transaction between an Indian and a non-Indian occurring within the boundaries of the Navajo Reservation. To allow such jurisdiction would infringe upon the sovereign power of the tribe to self-government, a right protected by long standing Federal statutes. Only by strict compliance with the Federal statutory procedures for securing such jurisdiction could the State acquire such authority. In *McClanahan* v. *Arizona State Tax Commission*,[55] it was held that the State of Arizona could not impose its income tax upon the income of an Indian derived from employment within the Navajo Reservation. It was no answer that the imposition of such a tax might not interfere with the operation of the government of that tribe. The right to self-government—the right to be free of the application of State law—pertained not only to the tribe as a government, it applied to every individual member of that tribe. And, most recently, in *U.S.* v. *Mazurie*,[56] the Supreme Court upheld the authority of the tribes of the Wind River Reservation in the State of Wyoming to regulate the sale and dispensation of liquor under tribal license within Indian country under the authority of Federal law. The defendant was a non-Indian and the sale in question occurred upon fee patent (nontrust) land, but the location of the bar was in near proximity to Indian-owned land in a community setting which had a significant Indian population. The only question before the Court was the power of the Federal Government to delegate to the tribe such a regulatory power but stated in dicta that it appeared that the tribe could exercise such regulatory power without benefit of Federal law on the basis of its own inherent sovereignty.

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[50] 163 U.S. 376 (1896).
[51] 241 U.S. 602 (1961).
[52] 231 F. 2d 89 (8th cir., 1956).
[53] 272 F. 2d 131 (10th cir., 1959).
[54] 358 U.S. 217 (1959).
[55] 411 U.S. 164 (1973).
[56] 419 U.S. 544 (1975).

From these decisions, it simply cannot be questioned that the power of a tribe springs from its own original, inherent sovereignty—a power which predates the coming of the European to this continent, predates the signing of the Declaration of Independence or the adoption of the U.S. Constitution, a power which has been repeatedly affirmed and recognized in our course of dealing with Indian tribes through a treaty process, through our Federal statutes and through our judicial decisions. The only question open to discussion is the scope and extent of that power. That question will be considered in other sections of this chapter.

Powers Stemming From Land Ownership

A second source of tribal power springs from the tribal ownership of their lands. Many administrative opinions and Federal court decisions, particularly those dealing with the power of tribes over non-Indians or Indians who are not members of the tribe, are premised on the power of the tribe to exclude persons from the reservation or territory under the jurisdiction of the tribe. This has led to a considerable degree of confusion, particularly in administrative opinions issued in the period immediately after passage of the Indian Reorganization Act in 1934, the result of which was to perceive limitations on tribal power which would not be present if the power were premised on "sovereignty".

The earliest recognition of the power of Indian tribes to exclude non-Indians or nonmembers from their territory is found in an opinion of Attorney Wirt in 1821:

> So long as a tribe exists and remains in possession of its land, its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent. * * * Although the Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent. They do not hold under the States, nor under the United States; their title is original, sovereign, and exclusive. We treat with them as separate sovereignties; and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory, without their consent, than we have to enter upon the territory of a foreign prince.[57]

A common feature found in treaties throughout the entire treaty-making period (i.e., until 1871) is a right of safe passage for non-Indians through the Indian country coupled with a prohibition against non-Indian settlement upon such lands. The Trade and Intercourse Act of 1802 [58] required that any non-Indian entering Indian country must have a passport. This provision was relaxed in the Trade and Intercourse Act of 1834 [59] but a somewhat similar provision authorizing Federal officials to remove persons who were not "legally" within Indian country was reenacted in 1858 [60] and was not actually removed from the book of statutes until 1934.[61]

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[57] 1 Op. A.G. 465 (1821).

[58] Act of March 30, 1802, 2 Stat. 139.

[59] Sec. 6, Act of June 30, 1834, 4 Stat. 729.

[60] Act of June 12, 1858, 11 Stat. 329, 332; Rev. Stat. 2149; 25 U.S.C. 222.

[61] Act of May 21, 1934, 42 Stat. 787. See Cohen, Handbook of Federal Indian Law (1940 ed.), ch. 4, p. 73, nt. 73 and p. 76.

In the latter part of the 19th century, several administrative opinions and judicial decisions were rendered reflecting the blur which crept into the legal analysis of the source of tribal powers. In 1855, Attorney General Cushing issued an opinion affirming the general jurisdiction of Indian tribes over all persons and things within the territorial limits:

> The United States assure to the Choctaw nation "the jurisdiction and government of all persons and property which may be within their limits west, * * * and secure said Choctaw nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the Constitution, treaties and laws of the United States, and except such as may be, and which have been, enacted by Congress, to the extent that Congress, under the Constitution, are required to exercise a legislation over Indian affairs." Can there be anything more explicit? The general rule is competency of the local jurisdiction, saving exception. Exception is to be shown. If a thing be not taken out by exception, it remains in the general rule. Here, the questions of exception are, first, the universal one of the Constitution, treaties, and laws of the United States; and secondly, the special one—which being included in the universal one, it did not need to specify—of acts of Congress regulating the affairs of the Indians.[62]

For reasons related to treaty negotiations, the Attorney General concluded that the Choctaw Tribe did not have criminal jurisdiction over non-Indians within the Indian country but did have full and complete civil jurisdiction over all persons and things within their territory. The significance of the opinion is that it accepted as the beginning point of analysis the proposition that Indian tribes are endowed with all of the powers of any sovereign and that those powers remained except as they may have been taken away.

While continuing to affirm tribal power over non-Indians, judicial decisions and administrative opinions toward the latter half of the 19th century regarding powers of the Five Civilized Tribes sometimes premised this power of the tribe on previously recognized authority to remove or expel non-members. Thus, in *Maxey* v. *Wright*,[63] it was held that tribes might impose license fees upon non-Indian attorneys for the privilege of practicing law before tribal courts, and in an opinion of the Attorney General issued in 1900,[64] it was held that the tribes could impose taxes for the privilege of conducting business within their borders. This opinion and decision were premised on the power of the tribe to either deny access of nonmembers to their facilities or the power to impose conditions upon the entry of nonmembers into their territory. But at this same time, the Supreme Court affirmed a decision of the District of Columbia Circuit, *Morris* v. *Hitchcock*[65] placing the tribal power of taxation of nonmembers within the tribal jurisdiction squarely on the basis of the sovereign authority of the tribe—not the power to expel or remove.

See also *Buster* v. *Wright*,[66] and the decision of the Attorney General in an opinion regarding the right of the Cherokee Nation to impose an export tax on hay grown by a nonmember within the limits of that nation.[67] As stated in *Morris* v. *Hitchcock*:

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[62] 7 OP A.G. 174, 180–181 (1855).

[63] 54 S.W. (Ind. Terr., 1900), aff'd, 105 F. 1003 (C.C.A. 8, 1900).

[64] 23 Op. A.G. 214, 219 (1900).

[65] 24 App. D.C. 565, aff'd, 194 U.S. 384 (1904).

[66] 82. S.W. 855 (Ind. Terr., 1904), aff'd, 135 F. 947 (C.C.A. 8, 1905), app. dism., 203 U.S. 599 (1906)

[67] 23 Op. A.G. 528 (1900).

> A government of this kind necessarily has the power to maintain its existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law. Any restriction in the organic law in respect of this ordinary power of taxation, and the property subject thereto, ought to appear by express provision or necessary implication.[68]

These opinions were examined at length in the Solicitor's opinion of October 25, 1934 [69] referred to in the section on sovereignty. The primary emphasis on the opinions issued immediately following the Indian Reorganization Act of 1934,[70] regarding powers of Indian tribes, rested on the power to condition entry onto Indian lands.

Yet repeatedly, the Solicitor's Office encountered situations requiring some identifiable regulatory authority, either Federal, State, or tribal, to regulate the conduct of non-Indians or nonmembers within Indian country that could only be accounted for by finding some power inherent in Indian tribes that arose from some source other than the simple power to expel or remove. Thus it was held that the tribes might seize stray cattle of a non-Indian which trespassed upon tribal property and sell the same at a public auction in order to cover the expenses of the tribe,[71] that the tribes might confiscate unlicensed dogs of non-Indians in furtherance of tribal police powers,[72] that tribes might seize and forfeit the fishing equipment of a non-Indian fishing within the reservation in violation of tribal laws,[73] and that a tribal court could enter a decree of divorce in a marriage between an Indian and a non-Indian.[74]

Clearly, the conception that the power of a tribe was limited to its power of removal from the reservation was not adequate to the law enforcement or regulatory needs of government in Indian country. As previously noted, with the *Iron Crow* decision in 1956,[75] the sovereignty of the tribe as the source of its authority was again recognized. The decisions recognizing this authority and exploring its parameters in conjunction with the persons over whom such authority extends are explored in the prior section.

The Federal Instrumentality Concept Versus Tribal Sovereignty

In recent years, a new concept has found its way into the decisions of the Federal courts, i.e., that tribes are an "instrumentality" holds that the tribes and their governments are the chosen instruments through which the Federal Government has elected to carry out its Indian policies. It is this theory or concept which has been employed in cases shielding tribal government and tribal members from the application of State laws which would encroach upon the rights of self-government guaranteed to the Indian people under treaties and statutes.[76]

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[68] 24 App. D.C., 565, 593, quoted at 55 I.D. 48.
[69] 55 I.D. 14, 46–48.
[70] Act of June 18, 1934, 48 Stat. 984.
[71] Sol. Op. to Comm. of Ind. Affairs, May 13, 1941.
[72] Sol. Op. to Comm. of Ind. Affairs, Feb. 17, 1939.
[73] Op. Asst Sec., Feb. 12, 1943, 58 I.D. 331, 333–34.
[74] Memo Sol. to Comm. Ind. Affairs, Feb. 11, 1939.
[75] *Supra*, note 26.
[76] *Williams v. Lee*, 358 U.S. 217 (1959) ; *Ariz. ex rel. Merrill v. Turtle*, 413 F. 2d 683 (10th cir., 1968) ; *McClanahan v. Ariz. State Tax Comm.*, 411 U.S. 164 (1973).

The second theory of "federal instrumentality" holds that the tribes, particularly tribal courts, are an arm of the Federal sovereign; in other words, a federally created instrumentality. This concept has emerged in the area of criminal law, but it has grave implications for the entire Federal-Indian relationship.

The concept of tribal courts as a federally established instrumentality first surfaced in the case of *Colliflower* v. *Garland*, a decision of the 9th Circuit Court of Appeals which held that a writ of habeas corpus would lie in Federal court to test a judgment of conviction in a tribal court.[77] The judgment of this court was based on an extensive review of the history of the development of the tribal court system and its intimate involvement with the Bureau of Indian Affairs. However, in holding that the tribal court was in essense a Federal instrumentality, the 9th Circuit placed itself in direct conflict with a prior judgment of the 8th Circuit Court of Appeals entitled, *Iron Crow* v. *Oglala Sioux Tribe*, which reviewed the same history of tribal courts of the tribes.[78]

The 1968 Congress statutorily extended to all persons the right to test, by way of habeas corpus, the judgments of tribal courts in Federal court proceedings.[79] As a result of this legislation, it was no longer necessary to establish the "Federal connection" to obtain judicial review of tribal court judgments. Nevertheless, in 1969, the 9th Circuit reaffirmed its holding in *Colliflower* as a basis for Federal review.[80]

The immediate problem which arises in connection with the "Federal instrumentality" doctrine is the application of the concept of double jeopardy as a constitutional bar to prosecution of offenses in both tribal and Federal courts. The issue was presented to the 8th Circuit in two separate cases in 1971 and 1972.[81] In each case, the court found other grounds for making its determination, thereby avoiding the issue. But, in the second of the two cases, *U.S.* v. *Kills Plenty*, there was divided opinion, the dissent asserted that based on *Colliflower*, tribal and Federal courts should be considered "arms of the same sovereign," thus making the doctrine of double jeopardy and/or collateral estoppel applicable as a bar to proceedings in Federal court after a trial of the case in tribal court. The majority of the court noted its disagreement with the dissent in a footnote, holding that if it were to decide the issue, it would rely on its prior decision in *Iron Crow*.

The most recent word on the subject, issued from the 9th Circuit in *U.S.* v. *Wheeler*, was decided in December, 1976.[82] The case is best summarized by quoting from the decision:

> The defendant, a Navajo Indian, plead guilty in Navajo tribal court on October 18, 1974 to charges of contributing to the delinquency of a minor and disorderly conduct, the charges growing out of an incident that had occurred on Indian territory two days earlier. Over a year later the defendant was indicted in Federal court for carnal knowledge of a female Indian under the age of sixteen years. There is no dispute that the Federal charge grew out of the

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[77] *Colliflower* v. *Garland*, 342 F. 2d 369 (9th cir., 1965).

[78] *Iron Crow* v. *Oglala Sioux Tribe*, 231 F. 2d 89 (8th cir., 1958).

[79] 25 U.S.C. 1302, 1303.

[80] *Settler* v. *Yakima Tribal Court*, 419 F. 2d 486 (9th cir., 1969), cert. den. 398 U.S. 903 (1970).

[81] *U.S.* v. *DeMarrias*, 441 F. 2d 1304 (8th cir., 1971) ; *U.S.* v. *Kills Plenty*, 466 F. 2d 240 (8th cir., 1972).

[82] *U.S.* v. *Wheeler*, No. 76–1509 (9th Cir., 1976).

> **same incident and the same actions of the defendant as the "contributing to the delinquency of a minor" charge before the Navajo tribal court. Before trial, the district court judge dismissed the indictment "on the basis that the defendant (had) already once been place in jeopardy for the same offense". We affirm.[88]**

The court based its prior decision on *Colliflower.* No mention was made of any of the three cases in the 8th Circuit.

The implications of this decision for jurisdiction of Indian tribes and for the power of Congress to take corrective action through legislation are apparent. If the doctrine of double jeopardy is applicable to judgments of tribal courts, there seems little doubt that either the courts or Congress will soon strip the tribes of authority to act in any situation which might potentially be prosecuted in Federal court. It is simply not tolerable that a person can plead guilty in tribal court to a minor offense and thereby preclude prosecution in Federal court for a major offense. It is essential that the separate sovereignty of the tribes continue to be recognized if the jurisdictional balance between tribal and Federal courts is to be maintained.

The second level of this problem, the limitation on the power of Congress to legislate in Indian affairs, is equally clear. If the governmental institutions of the Indian tribes, particularly tribal courts, are in fact federally created instrumentalities and thus arms of the Federal sovereign, there is no way that Congress can legislatively waive the requirements of the U.S. Constitution to the instruments of its own creation. This result would not only pertain to matters in the area of criminal law, but also to matters in civil law. If the "Federal instrumentality" doctrine enunciated in the *Wheeler* case is sustained, then it is clear that the entire panoply of Federal constitutional law must necessarily become applicable to the governments of Indian tribes.

It is vitally important that the courts and Congress continue to recognize that tribes are not the creatures of Congress but are separate and distinct sovereigns which the Federal Government has recognized. They are domestic, dependent sovereigns. They are not federally created instrumentalities. They are the instrumentalities through which the Federal Government has chosen to carry out its Indian policies. They are entitled to Federal protection—indeed, there is a Federal responsibility to protect them—but they are not subject to all and the same restraints which are applicable to the Federal Government.

Recommendations

In connection with this section of the report, the Commission finds that no legislative action is necessary at this time.

C. TRIBAL JUSTICE SYSTEMS

Overview

Tribal justice systems are evolving institutions which have grown out of traditional Indian mechanisms for dispersing justice.

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[88] Ibid., p. 2.

Traditional systems survived well into the 19th century, and although they varied considerably from tribe to tribe and region to region, they were characterized by consensual and well understood means for maintaining community harmony. Later on, some tribes adopted western style, formalized institutions into their tribal systems; however, the vast majority of the tribes retained traditional methods.

In the latter half of the 19th century, the Bureau of Indian Affairs created within the tribal setting Indian police and a Court of Indian Offenses. These were designed to enhance the authority of the Federal Government and undercut that of the traditional tribal leadership. The passage of the Indian Reorganization Act in 1934 permitted the tribes to establish or reestablish their traditional justice systems by virtue of the inherent sovereignty concept, the policy in the Department of the Interior, the language of IRA, or some combination of one or more of these. Today, traditional justice systems are emerging as viable tribal institutions playing a significant role in the provision of justice services on reservations. The systems vary in design, capacity, support, and efficacy. But all require continued and expanded Federal support and the flexibility for refinement and definition in order fully to meet reservation needs.

Background

Much has changed in the manner and form of tribal government operation since the arrival of western European institutions on the American continent. Some of the change has been evolutional, produced by the tribes themselves; the greater change, however, has been imposed upon the tribes by the direct and indirect operation of the United States Government. At their present level of development, few tribal institutions correspond to any traditional form or style. What modes of government Indian tribes would have developed to meet the demands of the changing centuries without the persuasive presence of the Federal Government is not known; what options are open to the tribes other than these western modes can only be speculated upon.

In the first several hundred years of contact, tribes were for the most part able to retain their traditional governing modes. These were highly diversified, ranging from the sophisticated confederacy of the Iroquois—a precursor of the federal system—to informal systems of communal consensus. To characterize all Indian tribes by any single generalization is factually misleading. Several general observations about Indian systems of government, in contrast to western systems, however, are pertinent. Most western governments are formalized institutions with voluminous sets of laws and regulations, largely related to private property concepts. Indian tribes and societies generally did not consider private property as central to a government's relationship to citizens; communal property concepts are far more prevalent in tribal societies than are individual property concepts. Because of this, theft within tribes was "virtually unknown."

Rather than the representative style typical of western governments, tribal societies were often governed by communal systems of chiefs and elders. Leadership was often earned by performance or acknowledgment and rested upon consensus and theological ground for exercise.

Many different systems existed for resolving disputes and maintaining order. Some tribes had warrior societies which functioned as enforcement mechanisms; other tribes utilized community pressure to enforce norms. Scorn is said to have been an extremely effective method of enforcement. Imprisonment was unknown, and restitution, banishment, and death were the major retributive sanctions utilized.

The first three-quarters of the 19th century wreaked havoc on these traditional tribal governing bodies.[84] Removal, continuous war, and the reservation era reduced most tribes to de facto wards of the Government. Traditional food supplies were gone. Tribes were forced, oft times brutally, into reservations, numbers and strength were depleted, and pure survival from starvation placed tribes at the mercy of the Government dole.[85] This dole was used as a frequent weapon by Indian agents to enforce the policy of the moment.

At this point in history, several factors merged to create new mechanisms for tribal governance which would eventually evolve, albeit contrary to the motives of the creators, into institutions for the maintenance of tribal sovereignty.

A major struggle for power occurred in the 1870's and 1880's between the civilian and military authorities for control over Indian reservations.[86] The civilian authorities, supported by many church organizations, sought ways to control the reservations without reliance on military troops. Aside from simple bureaucratic competition, civilian opposition to military authority was based primarily on the military tendency to settle all matters by extermination.

In addition to the power dispute, there was a growing assimilation fever; and law and order was felt to be a necessary component in the job of "civilizing" the Indians: to educate; to Christianize; and to transform the Indian economy from a subsistence hunting, fishing, gathering and trapping system to a western style farming economy. A system of laws was felt necessary because: "They cannot live without law. We have broken up, in part, their tribal relationships, and they must have something in their place." [87]

It was in this climate that federally controlled Indian police and courts developed. Indian agents, as part of the assimilation process, wished to further erode and undercut the remaining power and authority of the traditional leaders and the systems they represented.

Commissioner of Indian Affairs Price in 1881 referred to the new police and court system as; "* * * a power entirely independent of the Chief. It weakens, and will finally destroy, the power of tribes and bands." [88]

By 1890, there were Indian police in nearly all the agencies and Courts of Indian Offenses in two-thirds of the agencies.[89] The Indian police and the Courts of Indian Offenses were not always successful.[90]

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[84] Some tribes, notably those known as the Five Civilized Tribes, specifically adopted western style institutions for governance in the late 18th and early 19th century; these tribes, however, were the exceptions.

[85] Indian Police and Judges, at 6 (1966). Indian agents are referred to "as the local representative of the U.S. and fount of all favors."

[86] Id., quoting Indian Agent Edward P. Smith (1875), at 6.

[87] Id., quoting Bishop Whippel's advice to President Lincoln, at 9. Hagen also comments "But what was to be gained by destroying the concept of communal ownership if the new property owner had no legal machinery to protect his right?" at 5.

[88] Id., at 9.

[89] Id., at 27–43.

[90] *See* generally, BIA, Bureau of Law Enforcement, Indian Law Enforcement History.

Inadequacy of funding has always been a significant problem; it was not until 5 years after their creation that Congress provided any funds for the courts, and then to a very meager degree. Neither the Indian police nor the courts were able to eradicate the influence of traditional Indian culture or Indian custom, as some of the assimilationists had hoped. Instead, the combination was a curious mixture of western style law and tribal custom, because the Indian police and Courts of Indian Offenses exercised jurisdiction over both Indians and non-Indians. In the early days of western expansion, the breed of whites settling on or near Indian reservations created considerable trouble for the Indians. The famous "hanging" Judge Parker described these newcomers to the reservation areas as: "a class of men—who revel in the idea that they have an inherent right to steal from Indians." [91]

In some areas, in fact, non-Indians created the principal problems faced by Indian police and courts. In western Oklahoma, for example, much of the Indian police effort was directed at removing non-Indian herds from Indian lands.

The status of the Courts of Indian Offenses within the jurisdictional framework was unclear, and when potential test cases arose, the Department of the Interior generally avoided the test rather than meeting the issue.

Congress addressed the issue finally in 1934 when the Indian Reorganization Act (IRA)[92] was passed providing a system for reestablishing tribal governments. The Act provided for federally chartered institutions with constitutions and court systems. Although at the time of passage the IRA was perceived as a major shift in Federal policy favoring tribal self-determination and ending the erosion of tribes and their land bases, it actually provided, instead, a distinctly western model of government for the tribes. With assistance from the Department of the Interior, tribes were to draft their own constitutions, establish their own courts and codes of laws. In practice, most tribes using the IRA model either adopted the old system, which had, by this time, become known as 25 CFR courts[93] or adopted their own codes and courts closely modeled on 25 CFR.

Of major importance to an understanding of tribal courts in terms of present day issues and operations is the 1968 Indian Civil Rights Act,[94] which extended certain U.S. Constitution type protections to the operations of tribal governments and courts. The Act also congressionally limited the penalties that could be imposed by tribal courts to 6 months imprisonment and a $500 fine, or both.

The Current Justice Systems

In addition to preexisting tribal systems and 25 CFR systems, many tribal governments have created justice systems in the context of their inherent sovereignty, and under the auspices of the Indian Reorganization Act.[95] In 1976, there were 117 operative tribal courts in Indian country; this represents an increase of 32 courts since 1973 when there were 85.[96] In 1973, Indian tribal courts handled approximately 70,000 cases; although this caseload has increased, no actual current figures are available. These courts and the other components of the justice system are faced with herculean tasks and responsibilities. A 1974 survey conducted by the Bureau of Indian Affairs indicated that crime rates—predominantly alcohol related—on Indian reservations were significantly higher than in rural America.[97]

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[91] Hagan, supra at 53.
[92] 25 U.S.C. sec. 461, et seq.
[93] 25 CFR contains all the elements for the Bureau-created courts.
[94] 25 U.S.C. sec. 1301 et seq.
[95] 25 U.S.C. sec. 461.
[96] Source: National American Indian Court Judges Association.

The 117 Indian justice systems vary considerably from one another in both design and effectiveness. Like their non-Indian counterparts, Indian court judges are both appointed and elected.[98] There is no uniform standard, but as a general rule, most tribal judges are not attorneys.[99] At least one tribe requires applicants for judicial positions to pass an oral and written test on the tribe's constitution and laws.[100] Indian tribal courts function in both criminal and civil matters. In some areas, both the judicial and police functions are contracted from neighboring non-Indian communities.[101] In at least one area, a non-Indian government contracts law enforcement services from a tribal police department.[102] Some tribes provide extensive representation for indigent persons in tribal court; others provide none. Police services may be provided entirely by tribal police, by BIA officers or by a combination of BIA and tribal police. Tribal appellate systems also vary greatly. On some reservations, there is no appellate court system. Where tribes utilize 25 CFR Courts of Indian Offenses, appeals follow through the Department of the Interior. Some tribes have their own appellate court system; [103] others use judges from neighboring tribes for special appeals.[104] The tribal council may also constitute itself as the final tribal appellate system.[105]

Any generalization about tribal courts and law enforcement systems is therefore vague by definition. These are evolving institutions responding to tribal and community needs and operating at various levels of sophistication. Contrary to the views of some, there does not appear to be anything inherent in tribal justice systems that makes them any less capable than their non-Indian counterparts in dispensing justice.

However, one strong criticism of tribal government that occurred in the 1950's and that used as a rationale for allowing States to assume jurisdiction in Indian country (P.L. 83-280) was the perceived inadequacy and the non-professional level of tribal justice systems.

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[97] Memorandum to the Commissioner of Indian Affairs from T. Krenske, Director, Office of Indian Services, Mar. 13, 1975.

[98] E.g., on Gila River, judges are elected at large for 3-year terms. Southwest Transcript at 18. On Papago, judges are appointed by the council for 2-year terms. Southwest transcript at 119.

[99] The majority of non-Indian judges at the J.P. level nationwide are not lawyers. *North v. Russell* —— U.S. —— (1976) upheld the use of such judges in a case involving the conviction and sentencing of a person by a judge with a high school education but without any judicial training so long as there was the right of appeal to a court with a lawyer judge.

[100] Mojave-Apache, Southwest transcript at 257.

[101] Ak-Chin Indian Reservation uses a county judge for its tribal court judge. Interview report.

[102] Nespelem, Wash., contracts police services from the Colville Tribal Police Department, Northwest transcript, exhibits, affidavit of members of Nespelem City Council.

[103] Yakima Nation, Northwest transcript at 659.

[104] The Papagos have used Judge Rhodes from Gila River.

[105] Conceptually this is similar to the English system where the House of Lords is the court of last resort. This process is used by the Yankton Sioux Tribe, Midwest transcript at 144-45.

As one observer pointed out:

> If jurisdiction was (transferred) because of inability to administer criminal and civil jurisdiction in the early 1950's, it should have been foreseen that such capabilities would someday be developed * * *.[106]

In fact, such capabilities have been and continue to be developed. There are currently many institutions and programs that aid in this process that did not exist in the 1950's. The Indian lawyer, formerly a rare phenomenon, is being found in increasing numbers. It is presently estimated that whereas there were only approximately 20 Indian lawyers several decades ago, currently the number has grown to between 150–180. At least another 100 Indian students are enrolled in law school.[107] The National American Indian Court Judges Association now exists, and under Federal funding, provides resources, materials and training to Indian court judges. Among its publications are a five-volume work on Justice and the American Indian, and a handbook on Child Welfare and Family Law and Procedural Manual. Other public and private resources although insufficient for the totality of the need, are also available, such as the Native American Rights Fund, and the various Indian legal services programs.

Capabilities

That tribal justice systems are seen as evolving institutions is reflected in the fact that many tribes have just completed or are currently undertaking major revisions of constitutions, bylaws and law and order codes.[108] Thurman Trosper of the Flathead Reservation expressed the view that judicial systems are essentially new to many tribes as is the non-Indian concept of justice; they are operating quite well in view of their brief experience and are expected to develop a high level of sophistication.[109]

There is criticism of tribal courts received from varied sources. Montanans Opposed to Discrimination, an organization opposed to tribal jurisdiction over non-Indians, does not think much of tribal court systems in Montana.[110] The Assistant Area Director for the BIA, Portland, Oreg., however, takes a different view:[111] "While they may not be trained in the law and the relationship to Anglo-Saxon law, I do not know a tribal judge who doesn't know due process * * *." Albert Renie, the acting BIA Superintendent at Fathead, feels that the Flathead Court makes sure that everyone's rights are protected, adding that non-Indian business persons use the court for debt collection.[112]

Severt Young Bear, a councilman from the Pine Ridge Reservation, was severely critical of the "breakdown" of law on Pine Ridge. He attributed part of the problem to the role the Federal Government played in violating the tribal constitution by dealing solely with the chairman and ignoring the legally constituted governing body of the Oglala Sioux, the tribal council. Another problem has been the multiple exercise of criminal jurisdiction on Pine Ridge—by the FBI, the BIA, the U.S. marshals, State police and various "vigilante" groups. Notably excluded in that exercise is the tribal government.[113] An important footnote to the Pine Ridge story and the issue that has been raised in some quarters about the Indian capacity for self-government is that Oglala Sioux people in a popular election in 1976, turned out of office the tribal chairman for Pine Ridge under whose regime most of the problems occurred.

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[106] Letter from Douglas Nash, Counsel to the Umatilla Reservation to Donald R. Wharton, Task Force No. 4.

[107] Source: American Indian Law Center, Univ. of N. Mex. School of Law.

[108] E.g., San Carlos Apache, Southwest transcript, at 320, 321; Nez Perce, Northwest transcript at 697–700; Gila River, Southwest transcript at 76; Flathead, Montana transcript at 88; Winnebago, Midwest transcript at 431–32; Minnesota Chippewas, Great Lakes transcript at 162; and Oneida, Great Lakes transcript at 36.

[109] Montana transcript at 30.

[110] *See* ch. II, and ch. V, sec. E, of Task Force No. 4.

[111] *See* ch. II, and ch. V, at 142, Task Force No. 4.

[112] Ibid., at 57–58.

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Training and Funding

The ability to operate a justice system is often dependent on the training of its personnel and the financial resources of the system.

An extensive program now exists for the training of both Indian police officers and tribal court judges. The Bureau of Indian Affairs runs a police academy at Brigham, Utah, for the training of BIA and tribal police officers. A significant limitation, however, is that tribes must finance the officers' travel to and from training. In addition to this training, some tribal police departments provide supplemental training. Chief Johnson of the Colville Tribal Police Department indicated that his officers receive more training than do the deputies in the local sheriff's department.[114] Tribal police also are often recruited from the ranks of non-Indian police departments. The Suquamish Tribal Police include several county officers and a former Pennsylvania highway patrolman.[115]

The training provided for tribal judges usually comes through the National American Indian Court Judges Association. In the 1975–76 year, 199 persons participated in tribal court training sessions which have been conducted for the past 6 years and generally cover criminal law and family law.[116] The training sessions are conducted in regional centers for several days each month. No formalized onsite training is being provided via national programs, although some courts informally train new judges onsite. Some of the limitations of the existing programs as indicated by judges include an inability to attend because of workload and a desire for more extensive training.

Funding for justice systems comes from several sources. The Bureau of Indian Affairs, through contracts with tribes and direct services, expended approximately $24 million in the 12-month period ending in June 1976. Of this, approximately $3.5 million was spent on administrative expenses; $11.5 million in direct services; and $8 million in contracts to tribes; the remainder went to the training academy.[117] Law Enforcement Assistance Administration made grants totaling $4,691,000 to tribes out of its discretionary funds and another $900,000 out of LEAA's total block grant budget of $900 million went to law enforcement agencies in areas where tribes and substantial urban

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[113] Midwest transcript at 614.
[114] Northwest transcript at 96.
[115] Ibid.
[116] Source: National American Indian Court Judges Association.
[117] Source: Division of Law Enforcement Services, BIA.

Indian populations are located. It is not known what part of these funds went to tribal law enforcement systems.[118]

In addition to these Federal moneys, substantial tribal resources are expended for law enforcement systems. For example, the Colville Tribe spent $347,000 of its own funds [119] (BIA provided $21,800) for law enforcement this past year. The Yakima Nation spent $471,225 (BIA provided $69,400). Warm Springs estimates its expenses at $450,000—five to six times as much as the BIA spends ($79,400) on the Warm Springs law and order program. The Navajo Nation's tribal expenditures are close to $1 million [120] (BIA provides $465,000). All tribes indicated the need for more resources to support and utilize effectively law enforcement systems. Funds in some areas are being used in creative ways. The Warm Springs Tribe, in cooperation with the State of Oregon, has a "work release program" for criminal offenders. The Yakimas have started an alcohol detoxification center. The unmet needs are, however, substantial. The problems of small tribes in this area are overwhelming, particularly small tribes in P.L. 83–280 States which receive little or no Federal financial assistance.[121] Of the 481 federally recognized tribes, 326 have resident populations of 350 or less. Many of these tribes do not even have the funds to support the bare rudiments of tribal government, much less additional moneys to support sophisticated justice systems. On the Campo Reservation in Southern California, a $10,000 tribal development grant enabled the tribe, for the first time, to set up a basic recordkeeping system.[122] Other small reservations relate similar stories of basic unmet needs.[123]

Recommendations

The Commission recommends that:

Congress appropriate significant additional moneys for the maintenance and development of tribal justice systems:

> Funding be direct to tribes.
>
> Funding be specifically provided to enable tribal courts to become courts of record.

Congress provide for the development of tribal appellate court systems.

> Appelate court systems will vary from tribe to tribe and region to region.
>
> The development of tribal court systems will require tribal experimentation and time.
>
> Congress statutorily recognize such appellate systems as court systems separate from State and Federal systems.
>
> When tribal court systems are firmly operative, Federal court review of their decisions be limited exclusively to writs of habeas corpus.

These recommendations flow from the concept that tribal justice systems are evolving institutions that are capable of fair and efficient justice. Flexibility is needed to allow each tribe to develop fully the system that will operate well within its own individual context. The development of a tribal appellate system needs to be seen in this developing, experimental context. Some tribes are so situated that a tribal system may be appropriate; others may wish to develop regional appellate systems or appellate systems based on tribal relationship (e.g., the various Sioux tribes might wish to form an appellate system). The Federal Government's role in this area should be one of support, providing the funds and the mechanisms to allow for these developing institutions to evolve.

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[118] Source: Indian Desk, LEAA.

[119] Northwest transcript at 617.

[120] Northwest transcript at 692.

[121] Ibid., at 262.

[122] Southern California transcript at 83.

[123] *See*, e.g., Pauma, Southern California transcript at 9; Pala, Southern California transcript at 471; Keweenaw Community (Michigan) Great Lakes transcript at vol. II, 35.

D. TAXATION

Introduction

Of all of the issues discussed in this report, there is none more controversial than that of taxation. The issues are not well understood—nor in most cases does it appear there is any sincere desire to achieve understanding. The notion that tribes might have the inherent power to impose taxes upon persons or property within the jurisdiction of the tribe evokes cries of "no taxation without representation"—a rallying cry of revolutionists in 1776, and apparently 1976 as well. The fact that Indians enjoy limited tax immunities from State or county governments is cited as a ground for denying them access to or participation in either State or county government. The claim is that Indians have all of the benefits and none of the burdens.

The issue has become a focal point of those who have long advocated termination of the Federal relationship with tribes and a focal point of those who so long resisted opening the doors of their political systems to this visible minority and who yet would close those doors even to their own financial detriment. In a climate such as this it is difficult to discuss the issue rationally. Although undoubtedly well-intentioned, the dissenting report itself advances these very arguments.[124]

It was not until 1948 that the State of Arizona allowed Indians to vote in State elections after they had appealed the issue to the State supreme court.[125] At this very time the legislature of the State of Arizona is considering a bill that would divide two counties (Navajo and Apache) so as to create a single northern county which would be predominantly non-Indian. The non-Indian population of these counties support the legislation, citing as their reason that Indians do not pay taxes yet sit on the county boards. Yet it is acknowledged even by those non-Indians advocating this separation that the consequence of this political division will be to raise their own property tax to three times its current level.[126]

For the most part the "benefit-burden" argument would appear to be spurious. Contrary to widely held beliefs, individual Indians do not enjoy full tax exempt status. Except as to matters involving trust property, they are subject to all the Federal taxes that any other citizen pays. Theoretically, the rule is reversed as to State taxation of Indians within Indian reservations, but as a practical matter they pay most of the same State taxes as are paid by their non-Indian neighbors. In addition, they have long contributed revenues to tribal governments through processes other than those used by Federal, State and local revenue schemes.

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[124] Dissenting report, pp. 15–22.
[125] *Harrison v. Laveen*, 67 Ariz. 337 (1948), 196 p. 2d 456.
[126] The Arizona Republic, Mar. 20, 1977.

Of all of the governments involved, it would appear that only a comparatively small number (approximately 200) county governments[127] have legitimate grounds for complaint or concern, and this arises principally from the fact that a major part of county government revenue is derived from taxation of real and/or personal property.[128] But these complaints must be measured against the benefits which accrue to these local areas through (1) direct Federal subsidies such as impact aid, and other program moneys for health, education and general welfare, all designed to alleviate unusual money demands on those governments, and (2) indirect benefits which accrue to these local governments because of Federal and tribal expenditures of money which flow through the reservations to the non-Indian community.

The most outstanding feature of any analysis of taxation and the comparative "benefit-burden" discussion is the near total lack of any hard data. To the extent it has been developed it supports the conclusion that States are deriving more direct cash benefits from the Indian presence within their State than they would derive from the Indians themselves if Federal recognition were withdrawn and the States allowed to impose taxes without restriction.

A 1976 study of the Yankton Reservation in South Dakota commissioned by the Ninth District Federal Reserve Bank reflects a total direct Federal program expenditure of $3,164,117 compared to a total State expenditure of $1,214,701. The figure for the State is inflated, however, because many of these State expenditures actually involved Federal pass-through moneys. The program moneys expended by the State which did not involve at least some Federal pass-through total only $449,329 and of this sum more than $300,000 was spent on highway construction. By contrast, the St. Paul's Indian Mission at Yankton spent well in excess of $500,000. The great bulk of the moneys expended on behalf of services at this reservation passed directly into the adjoining non-Indian community.[129] The most thorough statewide analysis this Commission has been able to find dates from 1973 for the State of Arizona.[130] This study reflects a similar Federal-State expenditure ratio with corresponding cash out-flow from the reservations to the local non-Indian community.

To the extent tribes are now developing tax schemes of their own, they should most certainly be supported. Not only does the commitment to tribal self-government require this, so also does financial self-interest. In 1975 the State of South Dakota entered into a sales, service and use tax collection agreement with the tribes in that State. This agreement provided for collection of the described taxes by the State with a pro rata rebate to the tribes without charge for administration of the costs of collection. The income derived from this agreement has provided much needed money to the tribes for support of the costs of government. Recently the Oglala Sioux Tribe developed a comprehensive tax code. A special paper was submitted to Task Force Number Two providing the details of this code and reflects the extreme significance such taxing authority can play in making the tribes self-sufficient.[131]

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[127] Conversation with Jim Evans, National Association of Counties, Apr. 29, 1977.

[128] Report of the Board of Commissioners of Corson County, S. Dak., Cong. Rec., Mar. 20, 1977, at p. S5145.

[129] "Flows of Funds on the Yankton Sioux Indian Reservation", a study commissioned by the Ninth District Federal Reserve Bank, June 1976.

[130] Arizona State Indian Seminar, Subcommittee Report on Taxation and Services to Arizona Reservation Indians, 1973.

Narrative

The laws and policies presently applicable to the tax status of Indian tribes and individuals are often inconsistent and do not seem to have followed any single rational scheme. The impact is increasingly more important as all governments become more aware of revenue sources. Moreover, emerging tribal governments in search of greater self-determination through assumption of greater responsibilities and increased exertion of sovereign powers will be even more important in obtaining the benefit of the value of their natural resources and governmental prerogatives. Affirmative taxing powers and immunity from outside taxation will be crucial issues in this evolution. The following is a discussion of current tax laws.

Federal Taxation

Historically, tribes and individual Indians were not taxed by the Federal Government. In fact, Indians were not even counted for the purposes of apportioning representation in the Congress or for apportioning taxation by population to the several States.[132] However, in 1924, the Congress provided for automatic citizenship of Indians born within the United States, and in 1931 and 1935, two Supreme Court cases established that individual Indian residents were subject to the general tax laws of the Federal Government.[133]

Congress may, nonetheless, exempt individual Indians from such Federal laws pursuant to Federal-Indian policy or in furtherance of its trust obligation. Such intent must be express since an exemption will not be inferred by the Internal Revenue Service or the courts.

Federal Tax and Indian Tribes

As a general proposition Indian tribes are not taxed as entities. There is no case which has decided the issue nor any specific provision of the Internal Revenue Code exempting tribes, but the Internal Revenue Service has issued a ruling to that effect.[134]

This does not bestow upon tribal governments the full tax status enjoyed by other governmental units such as States and their political subdivisions.[135] Moreover, there are Federal statutes which extend Federal tax laws to tribes where they do not do so for States.[136]

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[131] Task Force No. 2, app. XV. Oglala Sioux Tribal Taxation System Case Study.

[132] Art. 1, sec. 1, clause 3, Constitution of the United States. See also, the 14th amendment to the Constitution.

[133] *Choteau* v. *Burnett*, 283 U.S. 691 (1931); *Superintendent of Five Civilized Tribes* v. *Commission*, 295 U.S. 493 (1935).

[134] Rev. Rul. 67-284.

[135] E.g., Rev. Rul. 58-610 exempting State and local governments from Federal excise tax, but not tribal governments.

[136] E.g., 45 Stat. 495, ch. 517 (1928), oil and gas production of the Five Civilized Tribes.

During the 94th Congress, the proposed Indian Tribal Government Tax Status Act (H.R. 8989 and S. 2664) was introduced to provide similar status to tribal governments for Federal tax purposes, a status which is enjoyed by State and local governments. The Act would not, however, have extended all such provisions of the 1954 Internal Revenue Code.[137] Any renewed attempts to introduce such a bill should seriously contemplate total extension of all provisions. Withholding of any of the provisions should be based on specific justification on a tribe-by-tribe analysis.

Tribes are distinct political entities possessing reserved sovereign powers and as governments with powers over their internal affairs, they have no less need for tax benefits than non-Indian governments. In fact, the stated Federal-Indian policy of self-determination and ultimate self-sufficiency would indicate that tribal governments may have greater need for these protections and benefits as they assume greater responsibilities.

Related to this are Federal tax laws which provide financial benefits to non-Indian governments by providing certain incentives to individual taxpayers in their dealings with those governments. These benefits are not presently enjoyed by tribal governments. The IRS has ruled that a decedent's bequest to the Zuni Indian Pueblo is not allowable as a deduction against Federal estate taxes,[138] that an individual's income from interest on tribal obligations issued by the Swinomish Indian Tribe is not an allowable deduction,[139] and special legislation was required to exempt interest on bonds issued by the Hopi Tribal Council.[140]

Disparity in the treatment of Indian tribal governments and non-Indian governments should be removed so that tribal governments may enjoy the benefits necessary to the generation of revenues. This is not to say nor to imply that tribal governments or individuals dealing with them will benefit from all of the provisions. Most tribal governments simply will not ever be engaged in some of the activities these provisions speak to. As such, they cannot have any measurable impact on revenue sources of Federal or State governments or derive any great benefits for tribal governments. However, it allows tribal governments and individuals dealing with them a uniformity of expectation and a clear expression of the status of tribal governments. Moreover, it goes far toward the overall scheme of providing tribal governments the tools they require to become self-determined and self-sufficient on a par with non-Indian governments.

Federal Taxation of Individual Indians

Individual Indians are subject to the general tax laws of the Federal Government unless expressly exempted by treaties, agreements or congressional acts. The exemptions run primarily to restricted Indian lands and allotments held in trust by the Federal Government for individual Indians and encompass income derived from such lands.[141] However, there are limiting factors in determining the exempt status of land and income derived from it. Individual situations are tested against the Federal-Indian policy of fostering financial independence through the protection and preservation of land for the Indians. Taxation of such lands or income from them would be inconsistent with such a policy and beyond the intent of Congress.[142] Therefore, taxation which would not run counter to such a policy would be permissible.

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[137] Proposed for extension, for example, were I.R.C. § 4055 (Federal retailers' excise tax); § 4221(a) (Federal manufacturer's excise tax); § 4292 (Federal communications excise tax); and § 4482 (Federal motor vehicle tax). Examples of withheld sections are I.R.C. § 115 (income from performance of government functions); § 3306 (Federal employment tax); § 4402 (sweepstakes wagering tax); and 5113 (Federal liquor tax).

[138] Rev. Rul. 73-179 regarding I.R.C. § 2055.

[139] Rev. Rul. 68-231 regarding I.R.C. § 103.

[140] *See* P.L. 91-264.

Exemption from Federal taxation of an individual Indian on lands and income must meet two major tests concerning: (1) what lands are within the exemption; and (2) what income can be said to be derived directly from the land. The following guidelines have been adopted by the IRS, as expressed in rev. rul. 67–284:

1. The land is held in trust;
2. The land is restricted and allotted and held for an individual noncompetent Indian, and not for a tribe;
3. The income is derived directly from the land;
4. The treaty or statute evinces a congressional intent that the allotment be used as a means of protecting the Indian during the trust period; and the language is clear as to congressional intent that such land not be subject to taxation.

The effect is to provide the narrowest possible reading to the exemption. The policy of fostering the economic welfare of the tribe could as easily translate into protection of the economic development of the individual Indian lessee of tribal lands. It is somewhat inconsistent to exempt income where the Indian person develops his own trust lands or the tribe its own, but where the individual leases the tribe's trust land, the exemption on income is lost. The same would be true where tribal lands were never allotted and are assigned to individual tribal members. The income would be taxable under the IRS ruling since the land is not held in trust for that Indian.

The broader policy of exempting Indians from taxation in areas designed to foster advancement and development is reflected in areas other than trust lands. For example, payments made pursuant to various employment programs to Indian residents of job training have been ruled nontaxable;[143] and funds paid to Indians for relocation and vocational training by the United States were ruled to be gifts and not subject to Federal income tax.[144] Congress has also exempted other distributions to individual Indians where the disposition of judgment funds, trust assets, or cash in lieu of allotments were involved.[145]

There must be a recognition that presently the disposition of the trust obligation and the implementation of Federal-Indian policy serve as separate grounds for congressional exemptions from Federal taxation of individual Indian assets. Much would be added to clarify and bring consistency of the law to policy implementation if Congress would enact a statute which exempts all income derived from trust lands by an individual Indian irrespective of whether the land is held in trust for that individual.

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[141] *Squire v. Capoeman*, 351 U.S. 1 (1956).

[142] *See* General Allotment Act § 6, 25 U.S.C. § 335; *Stevens v. Commissioner*, 452 F. 2d 741 (9th cir., 1971).

[143] Rev. Rul. 68–38.

[144] Rev. Rul. 57–233.

[145] *See, e.g.*, 25 U.S.C. § 772 (exemption of per capita distribution of judgment funds); 25 U.S.C. § 937 (division of tribal assets, Catawbas); 25 U.S.C. § 955 (exemption of cash paid in lieu of equalization allotment, Agua Caliente).

State Taxation

As with other areas in the assertion of State powers over individual Indians and tribal governments within reservation boundaries, States are limited to those areas where authority has been expressly conferred upon the State by Congress.[146] A State may not tax the income of a reservation Indian from sources within the reservation;[147] impose a sales tax on purchases by an Indian within the reservation;[148] or impose a personal property tax on Indians within the reservation.[149] The same reasoning would appear to apply to a State inheritance tax on the transfer of property of a deceased reservation Indian.[150]

Some confusion over judicial doctrine has developed over the years which has led to the present preemption/sovereignty analysis. Prior to *McClanahan*, two distinct doctrines emerged: The Federal instrumentality doctrine and the noninterference test. In *U.S.* v. *Rickert*, 188 U.S. 432 (1903), the Supreme Court held that a State tax on personal property and permanent improvements on Indian trust land was invalid as it interfered with the instrumentality[151] designed to achieve a Federal policy of assimilation and economic development. This same line of reasoning applied as well to non-Indian lessees of Indian lands.[152]

However, in 1938, the Supreme Court began to reject the doctrine where they perceived the interference with the governmental purpose or function to be insubstantial, indirect, or remote[153] and upheld a Federal tax on a non-Indian lessee of State school lands. In 1943, the Court decided *Oklahoma Tax Commission* v. *U.S.*[154] and cited a previous holding in *Helvering* v. *Motion Producers Corporation*[155] for the proposition that the Federal instrumentality doctrine was no longer valid as a constitutional bar for State taxation of income from Indian holdings. And finally in 1973, the Court rejected an argument that the doctrine would act as a bar to the State's taxation of the income from an Indian enterprise on trust lands outside of the reservation.[156] As a determinant of the power of the State to tax non-Indians on reservations in activities with Indians, and income from Indian enterprises off the reservation on tax exempt land, the Federal instrumentality doctrine is no longer sound.

"Noninterference" as a test was enunciated in *Williams* v. *Lee*[157] in 1959 and suggests that a State may exercise jurisdiction in areas such as taxation to the extent that it does not interfere with Indian self-government. The *McClanahan* court clarified the reach of the test to apply only to jurisdiction over non-Indians within the reservation where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdiction."[158] However, the State may require an Indian retailer to assist the State in collecting a State tax assessed against a non-Indian while making purchases from the Indian retailer on the reservation.[159]

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[146] *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

[147] *Bryan v. Itasca County*, 96 S. Ct. 2102 (1976).

[148] *Moe v. Confederated Salish and Kootenai Tribes*, supra.

[149] *Bryan v. Itasca County*, supra.

[150] *Kirkwood v. Arena*, 243 F. 2d 836 (9th cir., 1951).

[151] Individual allotments and their improvements were designed to foster Indian assimilation by encouraging individual ownership and to foster agrarian development by Indians.

[152] *Choctaw, O. & G.R. Co. v. Harrison*, 235 U.S. 292 (1914).

[153] *Helvering v. Mtn. Producers Corp.*, 303 U.S. 376 (1938).

[154] 319 U.S. 598 (1943).

[155] Supra note 30.

[156] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *see also, Agua Caliente Band v. County of Riverside*, 442 F. 2d 1184 (9th cir., 1971).

[157] 358 U.S. 217 (1959).

State taxation of reservation Indians depends upon congressional consent. Recent case law has resolved any doubt that such consent was given to those States assuming jurisdiction under P.L. 83-280. It was not.[160] There are, however, numerous Federal statutes which do provide for State taxation of reservation Indians and activities: State gasoline tax (4 U.S.C. § 104); State taxation of mineral production under oil and gas mining leases;[161] and taxation of reservation Indians in relation to their land (25 U.S.C. § 349, 610(b) and 63 Stat. 613 [1949]).

The reasoning behind the congressional authorization of State taxation of mineral production of Indian lands is not clear. The legislative histories of several of the acts have been cited for the proposition that the taxes were authorized in response to "the favorable economic position of the particular Indians." *Oklahoma Tax Commission* v. *Texas Co.*, 366 U.S. 342, 366–67 (1949). Other explanations of the reason for the enactment of the legislation might include pressure from the States for a share of the mineral revenues, a desire to increase the process of assimilation, and the desire to terminate the Federal Government's role as guardian, all of which were prevalent during the period in which the laws were enacted.[162]

Assuming the validity of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), which held that Congress has plenary authority to deal with Indian tribes and their property without regard to prior treaties, the Federal authorization of State taxation under the above statutes is valid. The statutes also appear to be valid under the *McClanahan* rule since there is express congressional consent to the taxation in each case. It has been suggested that in respect to State taxation of Indians under the above leasing statutes, congressional consent has been withdrawn by the 1938 Indian Leasing Act, 25 U.S.C. 396c, which contains no authorization of State taxation and repeals all prior inconsistent acts.[163] If this is the case, such taxation of Indians by the State would be invalid for want of congressional consent. The argument, however, is not totally persuasive, and in any case, it may be argued that not only the leasing statutes, but all statutes authorizing State taxation of reservation Indians, are inconsistent with Federal-Indian policy and consent to such taxation should be withdrawn. Such statutes almost all date from a period in which the termination of tribal identity and sovereignty was advocated. To the extent that they reflect such a policy, they are at odds with current Indian policies designed to vitalize tribal governments and reservation economies. The conclusion that State taxation of reservation Indians is inconsistent with such policies is supported by data which reflects the poverty of reservation Indians. The 1970 census indicated that the median family income of rural Indian families was $4,649 (half the national average.)[164] And finally, State taxation of reservation Indians does not give sufficient acknowledgment to Federal policy recognizing the sovereign nature of the tribe. Therefore, repeal of all Federal statutes authorizing State taxation of reservation Indians should be seriously considered.

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[158] 411 U.S. at 179.

[159] *Moe* v. *Confederated Salish and Kootenai Tribes*, 96 S. Ct. 1634 (1976).

[160] *Moe*, *supra*; *Bryan* v. *Itasca County*, 96 S. Ct. 2102 (1976).

[161] 25 U.S.C. §§ 398(c), 399, 401, 501, and several uncodified statutes.

[162] See 58 Cong. Rec. 172 et seq., May 23, 1919 (66th Cong.); S. Rept. 982, May 3, 1928 (70th Cong.); letter from Sec. Work; 68 Cong. Rec. 4703, Feb. 24, 1927 (67th Cong.). *See also*, L. Kelly, The Navajo Indians and Federal Indian Policy 1900–1935 (U. Ariz. Press 1968).

[163] *See* Israel, the Reemergence of Tribal Nationalism, Institute on Indian Land Development, Rocky Mountain Mineral Law Foundation, Apr. 1, 1976, pp. 10–50, fn. 72.

State Taxation of Non-Indians on Reservations

As discussed above, an early line of cases rejected taxing authority of States over non-Indian lessees of Indian land as being an unauthorized interference with the Federal instrumentality designed to implement Federal-Indian policy. The reasoning of that line of cases has, as indicated, been seriously eroded. In 1971, the U.S. Court of Appeals for the Ninth Circuit upheld a tax on the non-Indian lessee's interest even though the burden of the tax fell upon the Indian lessor, saying that the burden was insufficient to amount to an interference.[165] Thus, a nondiscriminatory tax is not invalidated by the Federal instrumentality doctrine.

Likewise, the State may tax a non-Indian where the incidence of the tax does not interfere with the tribe's rights to self-government.[166] Although this would include requiring an Indian merchant to collect the tax for the State,[167] the extent to which such taxation may clash with tribal development or tribal taxation powers has not been decided.

Current case law would appear to reflect a sense that State taxation of non-Indians dealing with Indians on a reservation does not constitute a sufficient interference with self-government or Federal-Indian policy as to prohibit the tax. A clear congressional expression that such enterprise furthers congressional policy aimed at reservation development and would involve an interference test and should thus preclude further State tax drains on reservation development.[168]

While States have been unable to tax Indian lands directly, they have been able to accomplish much the same result by taxing leasehold interests in Indian lands. In addition to the California possessory interest tax upheld in *Agua Caliente*, supra, there are similar taxes which would apply to non-Indian leasehold interests in Indian lands.[169] The exemption of Indian lands themselves from State taxation has been deemed by Congress to be necessary for the economic development of Indians, yet the economic development of Indians is jeopardized by State taxation of non-Indians' interest in Indian lands to almost the same extent as if the lands were taxed directly.

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[164] Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census, vol. III: American Indians 66–67, Dept. of HEW, 1974.

[165] *Agua Caliente Board v. Riverside County*, 442 F. 2d 1184 (9th cir., 1971); cert. den. 405 U.S. 933 (1972).

[166] *McClanahan v. Arizona Tax Commission*, supra; *Williams v. Lee*, supra.

[167] *Moe v. Confederated Salish and Kootenai Tribes*, supra.

[168] *See* Ronald Trosper, American Indian Mineral Agreements, Task Force 7, AIPRC.

[169] ARS § 42–701 et seq. (Arizona Rental Occupancy Tax); NMSA 72–30–2 (New Mexico property tax, applied to the leasehold interest of a non-Indian lessee of Indian lands in *Norvall v. Sangre Cristo Dev. Co.*, 372 F. Supp. 348 (DNM 1974), rev'd on other grounds, 519 F. 2d 370 (10th cir., 1975), R. C. Mont. 84–207 et seq. (Montana, privilege tax on possession of use of tax exempt property).

As in other cases where State taxation is inconsistent with Federal-Indian policy, the conflict should be resolved in favor of the latter and State taxation of non-Indians on reservations precluded.

It has been suggested that the tribes might preclude State jurisdiction to tax non-Indians under the noninterference test by taxing the non-Indians themselves.[170] A second solution would be for Congress to enact legislation which would revitalize the Federal instrumentality doctrine and deny the States authority to tax non-Indians in their transactions with Indians within the reservation and non-Indians performing services for the tribe or developing Indian lands for the benefit of reservation Indians or the tribe. This second proposal would leave the tribe free to assert or decline to assert whatever powers it possesses to tax such non-Indian activities. It would leave the States free to tax lands held in fee by non-Indians and all transactions between non-Indians, provided such taxation did not violate the noninterference rule. At the very minimum, legislation should be considered which would codify the noninterference test and place the burden of proving noninterference on the State. The shifting of the burden of proof would be consistent with current Indian policy and precedent.[171]

State Taxation of Indians and Indian Tribes Off-Reservation

Absent express Federal law to the contrary, Indians and Indian tribes are subject to State taxation when beyond reservation boundaries except, of course, for trust allotments.[172] However, lands acquired and held in trust by the Federal Government for a tribe are tax exempt.[173] Likewise, permanent improvements to such tax exempt land are tax exempt, but not the income from such land.[174]

There are also some cases which present what appear to be discarded distinctions between so-called "assimilated Indians" and those who presumably have not assumed the ways of the dominant culture. The Supreme Court has on at least two occasions upheld State taxation of reservation Indian assets held in trust and derived from reservation resources.[175] This situation is clearly contrary to the general rule stated in *McClanahan*, supra. However, the Supreme Court in *McClanahan and U.S. v. Mason*[176] suggested that *West* was distinguished because the Osage Indians involved in *West* has been assimilated into the State and that the Osage reservation was not self-governing.[177] Such distinctions are artificial and unworkable. The inquiry is properly stated in the general rule and should turn on whether the property is within or without the reservation, rather than some vague determination as to whether or not the individual Indian has been "assimilated." When beyond the reservation, the trust status of property should determine its taxability (a congressional policy).

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[170] *See* Goldberg, A Dynamic View of Tribal Jurisdiction to Tax Non-Indians, cited in Riehl, Taxation and Indian Affairs, Indian Law Manual, AILTP (1976); Israel, A Proposal for Clarifying the Tax Status of Indians, Task Force 4, AIPRC.

[171] *See* 25 U.S.C. 194, which places the burden of proving ownership on white settlers claiming Indian land.

[172] ***Mescalero Apache Tribe v. Jones***, supra.

[173] 25 U.S.C. sec. 465.

[174] ***Mescalero***, supra. Ski resort equipment was exempt on land leased from Federal Government, but income therefrom was not.

[175] ***Okla. Tax Comm. v. U.S.***, 319 U.S. 598 (1943); ***West v. Okla. Tax. Comm.*** 334 U.S. 717 (1947).

[176] ***U.S. v. Mason***, 412 M.S. 391 (1973).

[177] ***McClanahan***, 411 U.S. at 171; ***Mason***, 412 U.S. at 396.

With respect to taxation of income from off-reservation trust lands, the policy of Congress relevant to tribal self-sufficiency should be implemented by the courts given all reasonable inferences in favor of exemption. Clear congressional expression would do much to guide court determinations.

Current Developments in State Taxation of Reservation Indians

Since the Supreme Court decisions in *Bryan* v. *Itasca County*[178] and *Moe* v. *Confederated Salish and Kootenai Tribes*,[179] States and Indian tribes have been faced with the need to reach some agreement on implementation of those decisions. The issues largely involved State assertions of taxation authority over Indians on reservations, which were struck down as being without congressional authority. The State involved in the case, Minnesota, claimed authority under Public Law 83–280, a statute designed to allow State assumption of some areas of jurisdiction previously Federal. In interpreting the law, the court concluded that the Federal grant of jurisdiction to those States mandated or assuming it, did not include any expanded taxation powers.

In a meeting of the Western State Tax Administrators at Anchorage, Alaska, during the week of September 20, 1976, a statement was prepared for submission to this Commission.[180] Their submission identifies "three basic sources of jurisdictional controversy" in Federal-Indian policy:

> (1) The commingling of Indian and non-Indian persons within the reservation boundaries and concerns for constitutional rights of nontribal members on the reservation; (2) the "checker-boarding" of trust and fee land status and Indian/non-Indian land ownership within reservation boundaries; (3) present and potential tax-free economic enterprise taking place within reservation boundaries.[181]

It then offers four principles for incorporation by Congress in legislation designed to resolve State taxing jurisdiction on Indian reservations:

> 1. States are without power to impose State taxes with respect to on-reservation economic transactions and activities of enrolled Indians of that reservation the legal incidence of which is upon such Indians. However, States may require Indian retailers to charge, collect and remit to the State excise taxes levied upon non-Indian purchasers within the exterior boundaries of the Indian reservation.
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> 2. For purposes of application of these principles the term "Indian reservation" means all lands within the exterior boundaries of a federally recognized reservation.

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[178] 96 S. Ct. 2102 (1976).

[179] 96 S. Ct. 1634 (1976).

[180] States which joined in preparation of the report: Washington, Colorado, Idaho, Montana, Oregon, Utah, Arizona, Nevada, and Wyoming. Although California was not represented at the meeting, they sent a letter of approval. Testimony of Mary Ellen McCaffree at a meeting between the AIPRC and the Western State Tax Administrators on September 29, 1976. Transcript of the meeting at p. 3 (hereinafter, "Tax Administrators"). Also in attendance at the meeting were representatives from the State of Minnesota.

[181] Tax Administrators at pp. 4–5.

3. The term "Indian" means a person duly enrolled upon the membership rolls of the tribe upon whose reservation the economic transaction or activity occurs and who is domiciled upon such reservation.

4. States are authorized to use their general administrative and tax enforcement powers in furtherance of State collection of taxes lawfully to be remitted by Indians to the State, and further States are authorized to commence any State initiated tax enforcement litigation in either Federal or State courts.[182]

The State of Washington has issued a revised State revenue rule, designed to administer that State's tax laws consistent with their view of the holdings in the *Bryan* and *Moe* cases. Although the proposed revision recognizes that the reservation includes all land within the exterior boundaries without regard to the trust status of the land, it distinguishes "Indians" according to whether they are on their own or another reservation, purporting to tax them when they make purchases while on any reservation other than their own. And while recognizing that P.L. 83-280 confers no jurisdiction to tax reservation Indians or tribes, Washington's Revenue Rule 192 evinces an intent to tax personal property when removed from the reservation, including and especially automobiles or trailers. Finally, the rule requires Indian retailers to collect taxes from non-Indian purchasers (which are defined to include non-member Indians) and keep detailed records of sales to Indians not taxed.[183]

A more narrow application of the *Bryan* and *Moe* cases can barely be imagined. Minnesota, however, managed to surpass Washington. That State ignored the Supreme Court's rejection of "checkerboarded" jurisdiction enunciated in *Moe* and has instructed non-Indian retailers to continue to collect taxes from Indians on reservations irrespective of tribal membership. Minnesota's Tax Commission takes the position that the Supreme Court decision in *DeCoteau* v. *District County Court*[184] controls in Minnesota, and they will await the decision in *Rosebud Sioux Tribe* v. *Kneip*,[185] now in the Supreme Court, before taking further action. In the meantime, Minnesota Indian people are paying what is very probably an improper tax.

Tribal Taxation

As noted earlier, tribal governments, by and large, have not in the past chosen to exercise their inherent powers of taxation. Those cases which have decided the issue have uniformly upheld the tribes' taxing powers.[186] The court decisions rely largely upon the power of tribes to remove persons from the reservation, and consequently, to prescribe the conditions upon which they shall enter. However, *Iron Crow* v. *Oglala Sioux Tribe* specifically recognizes the inherent sovereign powers which exist, except where taken away. Surely this must comprehend at a very minimum the power of a government to sustain itself.

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[182] Tax Administrators at 13.

[183] Rev. Rule 192, State of Washington.

[184] 420 U.S. 425 (1975).

[185] 54 F. 2d 87 (8th cir., 1975); *see Rosebud Sioux Tribe v. Kneip*, #75-562, Apr. 14, 1977, for the Court's recent decision.

[186] *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th cir., 1956); *Buster v. Wright*, 135 F. 947 (8th cir., 1905), appeal dismissed, 203 U.S. 599 (1906); *Morris v. Hitchcock* 21 App. D.C. 556 (1903) aff'd, 194 U.S. 384 (1903); *Maxey v. Wright*, 545 W. 807, aff'd. 105 F. 1003 (8th cir., 1900); Indian Reorganization Act, 25 U.S.C. sec. 476.

The fact that tribal governments have not used taxation to support their governments does not compel the conclusion that they have not derived revenues from tribal members for that purpose. Tribal governments often take their operating costs out of the common fund derived from tribal revenues from resources held in common by the tribe. Rather than distribute the money, assess a tax, and recollect revenues, they simply appropriate the needed revenues in the first instance. Revenues from resources controlled by the State and Federal governments are treated in much the same way.

Because tribes have chosen to generate revenues differently from most non-Indian governments, this does not in any manner suggest that they lacked the governmental power to tax if they so chose. It would appear, however, that the enactment of taxation provisions may eventually become desirable if tribes are to continue to undertake ever-increasing functions of governments and if they are to have any hope of quelling the drain of resources from the reservations.

At present, States may require Indian merchants to collect State-imposed taxes from non-Indians if such collection is viewed as a minimal burden on tribal self-government.[187] As a result, tribal enterprises may lose what is seen by many States as a competitive advantage over non-Indian enterprises. What it also does is limit the scope of economic choices a tribe may make in how best to generate tribal revenues. The tribe may be forced to assess a tribal tax (similar to that of the State) tied to generating revenues to carry out a specific tribal governmental policy endorsed by Congress in its Federal-Indian policy. The cases suggest that the competitive State tax may then create a sufficient burden on tribal self-government (by frustrating part of its function) as to invalidate the State tax.

Such taxation raises the question of the rights of a nonmember of the tribe paying a tax to a government in which that person has no right to representation. Governments generally, however, may tax noncitizens without regard to representation when they are within the territorial jurisdiction of that government. However, where non-Indians live within the boundaries of the reservation and have no hope of ever becoming members of the tribal government, the issue is more difficult.

It should be noted initially that the fact that there is no right to participate in the tribal government does not mean that there is no recourse for the nonmember reservation resident. Congress has extended a number of clear limitations on the exercise of tribal powers. Pursuant to Public Law 90–284, no tribe in the exercise of its powers of self-government may deny any person equal protection of the law nor deprive him of liberty or property without due process of law. Judicial interpretation of the Act has uniformly recognized general jurisdiction in the Federal courts to review civil rights cases,[188] but required exhaustion of tribal remedies.[189] Moreover, nonmembers may have speedy review where there is a showing that there is no tribal review available or where such review would be futile.[190]

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[187] *Moe v. Confederated Salish and Kootenai Tribes*, supra.

[188] *Dodge v. Nakai*, 298 F. Supp. 26 (D-Ariz. 1969); *Spotted Eagle v. Blackfeet Tribe*, 301 F. Supp. 85 (D-Montana 1969).

[189] *Javis v. Wilson*, 521 F. 2d 724 (8th cir., 1975).

Presumably, tribal governments would also be held to the same standards of review concerning whether a tax would be discriminatory and/or confiscatory. Any tax assessed and collected from a resident nonmember may have to bear a reasonable relationship to a service provided or available to such resident nonmember. Moreover, any tribe moving into the taxing field would need to construct a governmental administrative process to enforce and manage it.

It is difficult to imagine that any tribal government would attempt to enact and administer a tax provision without looking into its relative merits and costs versus benefits. Clearly, they can expect challenges to such measures and would not provoke such a situation unless they were legally prepared to meet the occasion. It must be presumed, as with other governments, that tribal governments will act in a rational and intelligent manner to protect their best interests. Certainly, the history of the tribes is that they do so and will continue to do so.

In response to objections which have been raised before the Commission to the theoretical proposition that many tribes will soon begin to impose discriminatory and unjust taxes upon the property and income of reservation resident non-Indians, it should be pointed out that no tribes presently have done so nor have there been any reports of tribes planning to do so. As has been suggested above, should an Indian tribe provide governmental services, at the direct expenses of its own treasury, which would clearly benefit such a resident non-Indian (e.g., road or irrigation canal maintenance on his fee property) it would appear to be neither unreasonable nor unfair to require that such an individual share the expense of such a service on a fair, pro rata basis with all residents who may benefit, including tribal members.

In relation to potential tribal taxation of commercial activities of nonresident non-Indians or of nontribal industrial enterprises conducted on reservations, no discernible difference between tribal governments and State governments is apparent. The right of a State government to impose a tax upon commercial transactions of nonresidents, for example the tourist industry, has never been questioned so long as there is not an interference with interstate commerce. A tribal government stands on exactly the same footing. In a similar vein, States have traditionally imposed excise taxes and "right to do business" taxes upon nonresident individuals and corporations and their rights to do so have been well established in the law. That the resident State of such individuals and corporations does not receive any share in the taxing State's revenues has not been viewed as unconstitutional or unfair. A tribe is again on the same footing as the taxing State government.

Clearly, the solution to jurisdictional disputes between States and tribes in the area of taxation, as in many other areas involving the exercise of governmental powers, lies in the direction of negotiated intergovernmental agreements. The objective of such efforts would be to accommodate the respective interests of both parties in a neutral forum as an alternative to unsatisfactory and resource-consuming litigation. Invariably such a process involves some give and take with responsible compromises on the part of both parties. A healthy attitude which looks forward to this logical solution can be found in the statement of the Western State Tax Administrators submitted to the Commission:

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[190] *O'Neal v. Cheyenne River Sioux Tribe*, 482 F. 2d 1140 (8th cir., 1973); *Javis v. Wilson*, supra.

> **Should the Federal Government recognize tribes as governmental entities with certain attributes of sovereignty, the western States believe it would be necessary to stipulate what powers and responsibilities the tribe may exercise and over which persons and territory such powers extend.**
>
> **A simple repeal of Public Law 83–280 is insufficient. It is not a realistic goal at this time in our history to "turn back the clock" to a time when Indian tribes were sovereign nations and Indian people lived in isolation from non-Indian society. Court actions cannot restore the aboriginal status of Native Americans. What must be found is a way that individual tribal culture can be preserved and self-determination of Native Americans can be pursued concurrent with, not in conflict with that of non-Indian society. The danger in leaving this task undone is that these questions affecting the very fabric of our western society will be left solely to the courts to decide. If the jurisdictional matters are left to the courts, "normalized" relations between States and the tribes is "out of the question" for a long time to come.**

Obvious differences remain and a great deal of work must be done to resolve successfully such tribal-State conflicts. In many ways, the key lies in the recognition on the part of many States on the legitimate governmental status of Indian tribes and in the responsible acknowledgment of legitimate State governmental interests within Indian country on the part of many tribes.

Recommendations

The Commission recommends that:

Congress provide by approprate legislation that lands held in trust for an Indian tribe and assigned to an individual Indian are exempt from Federal taxation and that the income from such lands is also exempt, in the same way that restricted and allotted lands are presently exempt.

Congress provide by appropriate legislation that the benefits received from those programs designed to aid in the economic development of Indians shall not be subject to Federal taxation.

Congress amend the Internal Revenue Code to provide that provisions of the Code which apply to non-Indian governments are to be applied in a like manner and to the same extent to Indian tribal governments. This would include the same benefits enjoyed by individuals in their relations to tribal governments.

Congress amend or repeal, as appropriate, those statutes which authorize State taxation which is in conflict with Federal-Indian policy to foster economic development of reservation Indians and enhance tribal self-government. Specifically, State taxation of mineral production on leased Indian lands be repealed or amended.

Congress provide by appropriate legislation that State taxation within reservations be invalidated as applied to non-Indians when the burden of such taxation falls directly or indirectly upon the Indian.

Congress enact legislation which provides that where an Indian tribal government enacts a tax in furtherance of Federal-Indian policy designed to enhance the tribes' self-governing capacity or to protect or foster tribal economic development of Indian people or the tribe, such tax will have the effect of preempting any competing State tax which would be applicable to the same person or activity.

E. HUNTING, FISHING, TRAPPING AND GATHERING RIGHTS

The rights of Indian people to take fish and game and gather food are and have historically been an integral part of their subsistence as well as their cultural and religious heritage. In turn they have formed a foundation for their trade and commerce. These rights were widely recognized in treaty negotiations and have been found by the courts to exist even where not specifically reserved in treaties.[191] The regulation of these resources, so significant to Indian self-sufficiency and survival, has been the subject of much judicial definition.

The historical evolution of Federal-Indian relations has placed the exercise of these rights both within and without reservation boundaries. Within the boundaries of a reservation it is undisputed that Indian people may hunt, fish, trap and gather free from external regulation except where Congress has specifically provided otherwise. Beyond the boundaries the rights are defined by the specific treaty or situational terms under which they were reserved and must therefore be viewed carefully.

Conflicts and emotions continue to run high in some areas of the country over Indian fishing rights. There has been a marked unwillingness of non-Indian citizens in the State of Washington to accept the rulings of the Federal district court on these rights.[192] Indian fishing rights have also been identified as the reason for a failing fishery in the Northwest despite specific findings to the contrary.[193]

Of primary concern to all involved is the management and enhancement of the resources, both fish and game, to assure that there will be sufficient numbers to meet the needs and desires of all concerned. Federal, State, and Indian tribal involvement in a cooperative system is imperative to the ultimate achievement of an orderly and productive management and enhancement of the resources.

On-Reservation Rights and Regulation

Within the boundaries of an Indian reservation the tribe has the sovereign authority to regulate, restrict, and license hunting and fishing activities. Such authority is exclusive over tribal members so far as it has not been explicitly diminished by treaty or Federal statute. Most tribes do regulate the exercise of hunting and fishing rights and privileges for the protection and preservation of the resources and rights.[194]

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[191] *See generally*, *U.S.* v. *Winans*, 198 U.S. 371 (1904); for this doctrine; *Menominee Tribe* v. *U.S.*, 319 U.S. 404 (1968).

[192] *See*, e.g., transcript of AIPRC hearings in Portland, Oreg., Sept. 25, 1976; *U.S.* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

[193] *See* "Columbia Basin Salmon and Steelhead Analysis, Summary Report, Sept. 1976". Pacific Northwest Regional Commission.

[194] *See* e.g., Hobbs, "Indian Hunting and Fishing Rights," 32 Geo. Wash. L. Rev. 504, 523, nn. 100–101; *State* v. *McClure*, 127 Mont. 534, 268 p. 2d 629 (1954); Sol. Op. M 36638 (May 16, 1962).

Consistent with the tribe's jurisdiction over its resources and the territory where the harvest takes place, tribal regulation may also be enforced against nonmembers of the tribe as well as members.[195] These powers may also comprehend the exclusive authority to license non-Indians on the reservation who hunt and fish.[196] A tribe may be limited in the jurisdiction as to members or to Indians where their own constitutions or governing documents so limit them or where treaties or Federal statutes limit their powers or provide for the importation of State laws.[197]

Absent congressional authorization, States have no authority to regulate or control Indian hunting and fishing within the reservation. Even where Congress has provided for the assumption of some or all civil and criminal jurisdiction by States within reservations under Public Law 83-280, jurisdiction over hunting, fishing, and trapping rights was expressly withheld.[198] Moreover, it is immaterial whether the lands within the reservation are held in Indian or non-Indian title.[199]

On the question of hunting and fishing on the reservation by nonmembers the trend and generally the better view is that the State has no jurisdiction unless the tribe requires that nonmembers or non-Indians comply with State regulations.[200] This position is further reflected in Federal legislation which prohibits non-Indian hunting, fishing, and trapping on Indian reservations absent tribal consent (18 U.S.C. § 1165). Although that law does not contemplate bringing non-Indians under any Federal regulatory scheme, it strongly suggests that tribal regulation is preemptive of State laws.[201]

On those few occasions in which courts have considered attempts at on-reservation regulation by administrative Federal agencies, it has been rejected.[202] Even where treaties entered into subsequent to the Indian treaty outlawed the taking of migratory birds,[203] or a Federal enactment prohibited the taking of Bald Eagles, the rights of the on-reservation Indian are undiminished unless specifically curtailed. Abrogation of Indian hunting and fishing rights will not be implied into general congressional enactments.[204] The management of these Indian property interests is left to tribal self-government.[205]

In summary, it is fair to conclude that the primary regulatory authority within reservation boundaries is the tribal government. This would appear to be true whether the person involved is either Indian or non-Indian. The law on this latter point is, however, not finally settled.

Nonetheless, the States continue to question fundamental principles surrounding the exercise of Indian rights even within the reservation.

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[195] *Quechan Tribe of Indians v. Rowe*, 521 F. 2d 408 (9th cir.). (1976).

[196] *Colville Tribe v. State of Washington*, No. c-75-146 (E.D. Wash. 1976).

[197] *Quechan Tribe of Indians v. Rowe*, supra.

[198] 25 U.S.C. 1321-26; 18 U.S.C. 1162(b).

[199] *Leech Lake Band of Chippewa Indians v. Herbert*, 334 F. Supp. 1001 (D.C. Minn. 1971).

[200] See, *Quechan Tribe of Indians v. Rowe*, supra; *Colville Tribe v. State of Washington*, supra; contrast, *State v. Danielson*, 427 p. 2d 689 (Mont. 1967); compare, *Donahue v. Justice Court*, 93 Ca. Rptr. 310 cert. den., 404 U.S. 990 (1971) where the court held that unless immunized by tribal permission nonmembers were subject to State regulations.

[201] *See, U.S. v. Pullman*, 374 F. Supp. 995 (1973).

[202] *Mason v. Sams*, 5 F. 2d 255 (W.D. Wash. 1925).

[203] *United States v. Cutler*, 37 F. Supp. 724 (D. Ida. 1941).

[204] *United States v. White*, 508 F. 2d 453 (8th cir. 1974).

[205] Ibid.

Presently pending before the U.S. Supreme Court is an appeal from a ruling of the Washington State Supreme Court that State officers may enforce regulations against Puyallup Indians within their reservation boundaries on steelhead fish runs. Such a holding runs contrary to numerous rulings on the issue of State powers over such rights on-reservation.[206] Moreover, such a ruling may well be a taking of a property right to the extent it diminishes the ability of the Indian fisherman to take fish, thus decreasing the value of the right.[207]

Unresolved issues are squarely before the courts and will be determined in the near future. Accordingly, congressional action is premature in this area.

Off-Reservation Rights and Regulations: Limits of State Authority

The regulation of fish and wildlife resources beyond Indian reservation boundaries is inherently the domain of the various States.[208] These powers may, however, be overridden by Federal treaty if they would "impair a right granted or reserved by Federal law." [209] This is also the case where rights were reserved to an Indian tribe on lands later ceded where their hunting and fishing rights are still preserved.[210]

To determine the parameters of State regulatory power over off-reservation Indian treaty rights the particular language of the given treaty or Federal law must be examined.[211] It is the construction of the language used which defines the extent and nature of the rights and the kinds of regulation, if any, exercisable by a State.

Where treaties have reserved off-reservation fishing rights "at usual and accustomed places . . . in common with the citizens of the territory" the courts have held that State regulation is limited to those situations where it is reasonable and necessary to prevent the destruction of the resource. This "necessity for conservation" standard must be the least restrictive necessary to assure adequate escapement of the fish for spawning [212] and are allowed only when preservation cannot be achieved by restriction of nontreaty fishing.[213] The result is that the State may prevent the destruction of the resource by regulation of treaty fishing only when all other measures are inadequate.

Tribal Authority

However, where the tribe involved has promulgated their own regulations and has demonstrated the ability to enforce them over their members, the State may not regulate the treaty fisherman. The tribe must, of course, adopt those measures shown to be necessary for conservation and the States may step in where an emergency situation arises without a prior showing of the necessity to the court.[214]

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[206] E.g., *Moore* v. *U.S.*, 157 F. 2d 760 (9th cir. 1947); ***Leech Lake Band of Chippewa Indians*** v. *Herbert*, supra; *Arnett* v. *Five Gillnets*, 121 Cal. Rptr. 906 (1975), cert. den., 44 U.S.L.W. 3545 (Mar. 29. 1976).

[207] Cf. *Choate* v. *Trapp*, 224 U.S. 665 (1912). This may be the question somewhat since the State takes the position that the Indians have no right to artificially propagate steelhead which constitute part of the run.

[208] *Geer* v. *Connecticut*, 161 U.S. 519 (1896).

[209] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973).

[210] *Antoine* v. *Washington*, 420 U.S. 194 (1975).

[211] See, e.g. Treaty with the Yaicinas, 12 Stat. 951 ("at usual and accustomed places . . . in common with the citizens of the territory"); Treaty of Medicine Creek, 10 Stat. 1132 ("the privilege of hunting . . . on open and unclaimed lands"); Treaty with the Walla-Wallas, 12 Stat. 945 ("On unclaimed lands in common with citizens"); Chippewa Treaty of 1854, 10 Stat. 1009 ("shall have the right to hunt and fish therein, until otherwise ordered by the president.").

[212] *U.S.* v. ***Washington***, 384 F. Supp. 312 (W.D.W. 1974).

[213] *U.S.* v. ***Washington***, supra.

It is clear that in this situation the Federal district court has become the manager of the resource. No one would posit that such a situation is the most desirable or the most efficient management system. The reason for this situation was cogently described in the concurring opinion of Judge Burns when *U.S.* v. *Washington* was affirmed by the United States Ninth Circuit Court of Appeals:

> I deplore situations that make it necessary for us (District Court Judges) to become enduring managers of the fisheries, forests and highways, to say nothing of the school districts, police departments and so on. The record in this case, and the history set forth in the ***Puyallup*** and ***Antoine*** cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and the local non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice or be forgotten.[215]

This language is reminiscent of that delivered by Justice Miller in *United States* v. *Kagama* nearly 100 years ago when he wrote:

> They (the Indians) owe no allegiance to the States and receive from them no protection. Because of local ill feeling the people of the States where they are found are often their deadliest enemies.[216]

Need for Federal Involvement

Tribal enforcement over members exercising rights off-reservation may be to no avail absent effective State enforcement of nontreaty fisheries. Most of the treaty fisheries in Washington, for instance are found in the inland waters by troll and recreational fishing vessels. Federal regulation therefore becomes a prerequisite to any meaningful allocation between treaty and nontreaty inland fishery. Likewise there must be workable regulations pursuant to the International Pacific Salmon Fishery Commission to provide sufficient opportunity for treaty fishermen to take fish.

Where a State either fails to provide enforcement to protect the fishery or is unable as a result of its own laws the Federal Government must play a dynamic role. At present there is only minimal Federal enforcement authority. Where it proves to be inadequate the responsibility will fall once again upon the beleaguered Federal district court. Congress should act in this area where indicated.[217]

Other off-reservation rights held by Indian people do not carry the qualification that they be shared "in common with" nontreaty users of the resource. In such situations, the rationale for State regulation is lost and has been so held by some courts.[218] Decisions have also indicated that such rights may be subject to State regulation for conservation purposes.[219] There has not yet been a United States Supreme Court review of this issue.

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[214] *Puyallup Tribe* v. *Department of Game*, 391 U.S. 329 (1968).

[215] *U.S.* v. *Washington*, 520 F. 2d 676, 693 (9th cir. 1975) (concurring opinion).

[216] 118 U.S. 375, 383–84 (1886).

[217] See, "Action is Needed Now To Protect Our Fishing Resources," Report to Congress by the Comptroller General of the United States, Feb. 18, 1976.

[218] *State* v. *Arthur*, 74 Ida. 251, 261 p. 2d 135 (1953); *State* v. *Tinno* 94 Ida. 659, 497 p. 2d 1386 (1972); *People* v. *Jordreau*, 384 Mich. 539, 185 N.W. 2d 375 (1971).

[219] *State* v. *Tinno*, supra, indicated in the portion of the decision addressing fishing rights that may be so limited; *People* v. *LeBlanc*, 55 Mich. App. 684, 223 N.W. 2d 205 (1974), Aff'd 399 Mich.—(decided Dec. 27, 1976).

The Idaho Supreme Court has recently ruled that aboriginal rights to hunt and fish survive where they have never been extinguished, but that the authority of the State for purposes of conservation remains.[220]

Summary

Although the issue was not addressed in these cases it would follow that the tribes affected would have regulatory powers over their members. Indian regulation would fulfill goals which cannot be reached by State regulation of the exercise of treaty rights (e.g. allocation of sites and times). Tribal powers therefore provide an important adjunct to the regulatory scheme.

Hunting, fishing, trapping, and gathering rights of American Indian peoples are an important aspect of their subsistence, economic, cultural, and religious heritage, and were reserved by Indian people in treaties or for them as a part of the lands set aside for their exclusive use and occupancy.

American Indian hunting and fishing rights have been exclusively litigated and many jurisdictional questions have been answered by the courts. Such litigation has an extensive history reflecting great sums of money spent by Indian tribes and individuals to litigate and relitigate rights guaranteed under age-old treaties and agreements.

The hunting and fishing rights of Indian peoples have been frustrated and in many cases completely cut off due to the exercise of State police powers directed toward Indian people when litigation was pending and in some cases despite favorable decisions to Indian people. Likewise States have failed in some instances, particularly in Washington State, to enforce fishing restrictions against non-Indian fishermen violating Federal court ordered cessation of fishing.

There has been a serious depletion of fish and game resources brought about by the elimination and degradation of fish and wildlife habitat, fish-passage losses at mainstream dams, and rapidly growing use by commercial and sports interests on fish and wildlife resources.

Management of the fish and wildlife resources clearly requires the cooperative efforts of Federal, tribal and State authorities in regulation of allowable harvests and in stimulation of new resources.

Indian tribes have hunting and fishing rights which are an integral part of transitory or migratory resources such as marine fisheries and deer herds as well as rights shared in common with non-treaty users of the resource at off-reservation sites.

Many Indian tribes are carrying on substantial enhancement and management efforts of their own with limited resources and insufficient support from State and Federal entities.

Although some tribes have wildlife and fishery biologists and other necessary experts, most require additional personnel and training programs to augment and expand programs and to implement new measures desirable for enhancement and management of the resource.

Revenues derived from the harvest of fish and wildlife resources (e.g., licensing fees) on some reservations provide the foundation for significant economic activity for the tribe and its members.

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[220] *State v. Coffee*, No. 12040 (S. Ct. Idaho, decided Nov. 23, 1976).

Recommendations

The Commission recommends that:

1. The Department of the Interior aid Indian tribes in the development of comprehensive management plans for fish and wildlife resources. Indian people must be involved in the management of their own trust resources.
2. The executive branch undertake action to stimulate the tribes and States to enter into cooperation agreements in the management, allocation, and enforcement of off-reservation fishing activities by both Indians and non-Indians. Such cooperative agreements must recognize the rights of the Indians in the fish resources and their responsibility in the management and allocation of that resource.
3. Congress appropriate funds necessary to aid individual tribes and intertribal organizations in the development and management of fishery programs.
4. Congress enact legislation authorizing the Department of the Interior (Parks and Wildlife Division) with standby authority to allocate fish resources and enforce such allocations as to Indians or non-Indians or both, whenever the States or the tribes fail to regulate those persons under their respective jurisdiction.

FEDERAL CONSTRAINTS ON TRIBAL GOVERNMENT

A. THE INDIAN REORGANIZATION ACT OF 1934

Chapter 1 of the report of Task Force Number Two sets forth an extensive discussion of the relation of the Department of the Interior to tribal government. The relationship of that Department, or the Bureau of Indian Affairs, in political matters is a nagging and continual problem. These problems surface in a number of settings: (1) Secretarial involvement in election disputes; (2) Secretarial involvement in ratification and approval of tribal amendments to constitutions and bylaws; (3) Secretarial involvement in review and approval of ordinances or laws adopted by tribal councils; and (4) ultimately, the claimed authority of the Secretary to revoke tribal constitutions which were not adopted under the Indian Reorganization Act and thus effectively suspend tribal government.

There are five basic sources of authority which the Secretary invokes as support for these basically political decisions: (1) Sections 2 and 9, title 25 of the U.S. Code which vest the management of Indian affairs in the Commissioner of Indian Affairs and authorize the President to prescribe such regulations as he might think fit for carrying into effect the various provisions of Acts of Congress relating to Indian affairs; (2) section 16 of the Indian Reorganization Act of 1934[221] which authorized Indian tribes to reorganize under that Act and adopt constitutions and bylaws subject to approval of the Secretary; (3) the general trust responsibility, particularly as exemplified by section 81 of title 25 restricting the rights of contract with relationship to trust assets; (4) the judicially established guardian-ward relationship; and (5) powers of review and approval vested in the Secretary by tribes which adopted constitutions pursuant to the Indian Reorganization Act.

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[221] 25 U.S.C. 476.

As noted by Task Force Number Two, the Federal officials have in the past exercised heavy-handed control over the day-to-day operations of tribal government.[222] In 1934 when the Indian Reorganization Act was enacted, some degree of regulatory supervision may have been justified. Many tribes were moving for the first time to a constitutional form of government. But, the tribes have now had 40 years of experience in the operation of their governments. And, the enactment of title II of the Civil Rights Act of 1968 with its broad procedural safeguards for persons affected by the actions of tribal governments contradicts the need for the pervasive administrative control which has so often characterized the relation of the tribes to the Department of the Interior.

The right and power of Indian tribes to form their own governments exist independent from Federal statute. This was well-recognized at the time the Indian Reorganization Act was enacted.[223] But, due to the Federal policies which had been pursued in the latter half of the 19th century and the first half of the 20th century, many of the traditional instruments of tribal government had been drastically weakened and some lost for good. This was recognized by Congress when it included section 16 of the IRA authorizing tribes to organize under that Act if they elected to do so.

It is ironic that this Act, which was intended to strengthen the governments of Indian tribes, is now generally regarded by the Indian people as an impediment to their governmental functions. The Act itself presents certain problems since it requires that the constitutions and bylaws adopted by tribes pursuant to the Act be ratified and approved by the Secretary. But, more significantly, much of the authority of the Secretary to pass upon the validity of tribal enactments stems from provisions of constitutions which tribes adopted pursuant to the Act. These provisions, taken from a "model" constitution drafted by the BIA after passage of the 1934 Act, commonly provide that the laws adopted by the tribe shall not take effect until such laws have been reviewed and approved by the Secretary.

This review process has been generally condemned as perpetuating a paternalistic relationship between the Department of the Interior and the tribes. Paternalism aside, it has also impeded tribes in their efforts to assert authority within reservation boundaries through the simple expedient of a Secretarial veto of tribal ordinances which he conceives as being beyond the power of a tribe. Thus, for years, the Department denied that tribes could exercise any jurisdiction over non-Indians even though there was no clear statute and no judicial decision to affirm the Department's position.[224] The efforts of the Colville Tribe to impose a water use code within the boundaries of their reservation was thwarted by the refusal of the Secretary to approve their proposed code.[225] In a most extraordinary case, the Coeur d'Alene Tribe was denied permission to enact a code provision regulating the playing of an Indian stick game within their reservation even though a Federal court had held that the playing of the game was not within the purview of Federal law. In this case, Departmental veto of the tribal ordinance was instigated at the request of the Department of Justice.[226]

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[222] Task Force No. 2 Report, p. 13.

[223] Sol. Op., Oct. 25, 1934, 55 I.D. 14 at 30–32.

[224] Sol. Op. 17–36810 dated Aug. 10, 1970.

[225] This problem is now in litigation.

Aside from problems relating to Secretarial review of tribal ordinances, on at least two occasions the Secretary had claimed the authority to revoke outright the constitutions of tribes which had not organized under the Indian Reorganization Act. Thus, in 1961, the Secretary of the Interior withdrew recognition of the 1927 constitution and bylaws of the Fort Peck Council on the authority of 25 U.S.C. 2, stating that in his opinion such action was in the best interests of the Indians involved. The legal opinion upon which the Secretary based his action carefully stated that his action was not based upon any "trustee" relationship (which the opinion notes is founded in property) but rather on the "guardian-ward" relationship.[227]

In 1972, the Commissioner of Indian Affairs withdrew his recognition of the 1932 constitution of the Prairie Band of Pottawatomie Indians, again on the authority of 25 U.S.C. 2. A complaint filed against the Commissioner of Indian Affairs in Federal district court was ultimately dismissed for lack of subject matter jurisdiction. It was not until mid-1975 that a new constitution was adopted by the tribe. In the meantime, the affairs of the tribe were handled by a spokesman appointed by the Bureau of Indian Affairs without any apparent legal authority.[228]

During the course of the Commission's investigative studies, Indian people have related scores of instances wherein the BIA has flagrantly violated not only its mandated role, but the basic principles of the United States trust responsibility. These practices of the Bureau of Indian Affairs are in clear violation of Federal policy and should be halted immediately. Tribal governments must have mechanisms to insure that the Bureau of Indian Affairs upholds the trust responsibility of the Federal Government. Tribal governments must and should have equitable remedies to prevent further unwarranted BIA interference in the operations of tribal governments.

Data gathered by this Commission over the last year is testimony to the fact that the Bureau of Indian Affairs has acted directly to undermine tribal governments,[229] and has refused the technical, legal, and financial assistance it is mandated to provide.

Special allegations witness the Bureau of Indian Affairs:

1. directly interfering in tribal elections.[230]
2. usurping one of the most basic powers of self-government—the right to determine membership, by conditioning BIA funding on BIA-determined membership qualifications.[231]

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[226] Letter dated Apr. 20, 1967 from Acting Asst. Sol. to Commissioner of Indian Affairs. *See* app. II, part II, ex. 5 of Task Force No. 9 report.

[227] Sol. Op. IA-1229 dated Jan. 19, 1961, to Secretary of the Interior.

[228] Task Force No. 9 report, app. II, part I, ex. 2.

[229] Tribal Government Task Force Field Consultant Report on Standing Rock Sioux Standing Rock Reservation, p. 3; Tribal Government Task Force Field Consultant Report on Cheyenne River Sioux, Cheyenne River Reservation, p. 3.

[230] Bureau of Indian Affairs Support for the Functions of Tribal Government, Case Study of Pine Ridge Reservation; Special Report to the Tribal Government Task Force, American Indian Policy Review Commission, pp. 32-36.

[231] Tribal Government Task Force Field Consultant Report on Cheyenne River Sioux, Cheyenne River Reservation, p. 11; Tribal Government Task Force Field Consultant Report on Fort Berthold Reservation, p. 9.

3. playing off one tribe against another in competition for funding.[232]

4. conditioning BIA funding or delivery of services on the level of cooperation between tribal members and agency or area office employees.[233]

5. failing to respond to tribal requests for legal assistance.[234]

6. failing to respond to tribal requests for financial assistance.[235]

7. failing to respond to tribal requests for technical assistance.[236]

8. failing to assist tribes in asserting their sovereign powers.[237]

9. entering into leases or contracts on behalf of the tribe without tribal approval.[238]

10. specifically acting to diminish tribal exercise of powers of self government.[239]

11. terminating tribal employees from area office without notification to tribe.[240]

12. allocating judgment funds without approval of tribal council.[241]

13. displaying nepotism and favoritism in agency office hiring practices.[242]

14. withholding information on tribal trust resources from tribe.[243]

15. advising tribal members to sell their land to qualify for State welfare.[244]

16. failing to act upon tribal requests for Secretarial approval of contracts.[245]

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[232] Ibid., p. 11.

[233] Tribal Government Task Force Field Consultant Report on Fort Berthold Reservation, p. 9; Tribal Government Task Force Field Consultant Report on Uintah-Ouray Reservation, p. 5; Tribal Government Task Force Field Consultant Report on Northern Cheyenne Reservation, p. 5; *et al.*

[234] American Indian Policy Review Commission public hearings conducted by Task Forces 3 & 4. Superior, Wis.; Mar. 19–20, 1976; II, p. 21; Tribal Government Task Force Field Consultant Report on Pala Reservation, p. 1; Tribal Government Task Force Field Consultant Report on Zuni Reservation, p. 2.

[235] Tribal Government Task Force Report on Santa Rosa Rancheria, p. 4; American Indian Policy Review Commission Public Hearings conducted by Task Forces 2 & 4; Phoenix, Ariz.; June 2–3, 1976; pp. 104–106.

[236] American Indian Policy Review Commission Public Hearings conducted by Task Forces 1, 3 and 4; Yakima, Wash.; Feb. 4, 1976; p. 428; Tribal Government Task Force Report on Fort Berthold Reservation, p. 9; American Indian Policy Review Commission Public Hearings conducted by Task Forces 2 and 4; Phoenix, Ariz.; June 2–3, 1976; pp. 104–106; Tribal Government Task Force Report on Rocky Boy's Reservation, pp. 2–4; Tribal Government Task Force Report on Laguan Pueblo, pp. 7–8; Tribal Government Task Force Report on Northern Cheyenne Reservation, p. 7; Tribal Government Task Force Report on Pala Reservation, p. 2.

[237] Tribal Government Task Force Report on Quinault Reservation, p. 6; Tribal Government Task Force Report on Rocky Boy's Reservation, p. 2.

[238] Tribal Government Task Force Report on Uintah-Ouray Reservation, p. 1.

[239] Tribal Government Task Force Report on Seneca Nation, Allegany Reservation, p. 3; Tribal Government Task Force Report on Makah Reservation, p. 6; Tribal Government Task Force Report on Fort Berthold Reservation, p. 5; Tribal Government Task Force Report on Cheyenne and Arapaho Tribes of Oklahoma, p. 2; Tribal Government Task Force Report on Quinault Reservation, p. 5; Tribal Government Task Force Report on Standing Rock Reservation, p. 3.

[240] Tribal Government Task Force Report on Northern Cheyenne Reservation, p. 8.

[241] American Indian Policy Review Public Hearings conducted by Task Forces 2 and 4; Phoenix, Arizona; June 2–3, 1976; p. 135–136.

[242] Tribal Government Task Force Report on Fort Berthold Reservation, p. 9.

[243] Tribal Government Task Force Report on Quinault Reservation, p. 6.

[244] Tribal Government Task Force Report on Creek Tribe of Oklahoma, p. 5.

[245] Tribal Government Task Force Report on Navajo Reservation, p. 5–6; Tribal Government Task Force Report on Makah Reservation, p. 6; Tribal Government Task Force Report on Northern Cheyenne Reservation, p. 3.

17. failing to act upon tribal requests for Secretarial approval of tribal constitutions, constitutional amendments, ordinances, resolutions, charters.[246]
18. mismanaging tribal trust assets and resources.[247]
19. obstructing tribal negotiations with Federal agencies.[248]
20. discouraging tribes from contracting Federal programs which would obviate Bureau services.[249]
21. distributing Federal program moneys in an arbitrary manner, relying upon the broad discretionary power of the Secretary.[250]

These problems are further compounded by the fact that tribes have no effective remedy to counter them. Tribes are beholden to the Bureau for technical assistance, most services, and financial support. They are confronted with an administrative structure that takes care of its own—Bureau employees fear the accomplishment of Indian preference within the Bureau.[251] This condition works to prevent the disclosure of error or malintent, and frequently acts to eliminate virtually any possibility of tribal redress of grievances. Tribal requests for assistance are not responded to. Tribal requests calling for the transfer of an agency superintendent or area director are ignored.[252] Tribal evaluation of services rendered by the Bureau is, in many places, nonexistent. Thus, the transgressions of the Bureau continue to flourish in a bureaucracy which is not accountable nor responsive to Indian people.

To remedy these serious problems, the Commission calls for substantial amendment of the Indian Reorganization Act and the provisions of 25 U.S.C. sec. 2 which vests the management of Indian affairs in the Commissioner of Indian Affairs, and sec. 81, which restricts the right of contract regarding Indian trust property.

In addition to amendment of section 16 of the IRA (25 U.S.C., sec. 476), it appears other protective provisions relating to land protection and acquisition, etc., of that Act should be extended to all tribes without condition upon their acceptance or rejection of the Act. This recommendation is premised on the finding of Task Force Number Two that there is practically no discernible difference in the treatment or relationship of IRA tribes and non-IRA tribes to the Federal trustee.

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[246] Tribal Government Task Force on Laguna Pueblo, p. 2; Tribal Government Task Force Force Report on Fort Berthold Reservation, p. 4; Tribal Government Task Force Report on Pyramid Lake Paiute Reservation, p. 2; Tribal Government Task Force Report on Uintah-Ouray Reservation, p. 4; Tribal Government Task Force Report on Creek Tribe of Oklahoma, p. 3.

[247] American Indian Policy Review Commission Public Hearings conducted by Task Forces 2 and 4; Phoenix, Arizona; June 2–3, 1976; p. 221–222; Tribal Government Task Force Report on Northern Cheyenne Reservation, p. 3–4; Tribal Government Task Force Report on Standing Rock Reservation, p. 7; Tribal Government Task Force Report on Navajo Reservation, p. 5–6; Tribal Government Task Force Report on Makah Reservation, p. 6; Tribal Government Task Force Report on Zuni Reservation, p. 8.

[248] Interview with Officer of Intergovernmental Relations and Regional Operations Division, Office of Management and Budget; July 9, 1976; Tribal Government Task Force Report on Makah Reservation, p. 9.

[249] Interview with Officer of Intergovernmental Relations and Regional Operations Division, Office of Management and Budget; July 9, 1976.

[250] Tribal Government Task Force Report on Comanche Tribe of Oklahoma, p. 6.

[251] Bureau of Indian Affairs Management Study; Section 2 Study Provision: Report on BIA Management Practices to the American Indian Policy Review Commission; September, 1976; p. 34.

[252] Tribal Government Task Force Report on Northern Cheyenne Reservation, p. 5.

Recommendations

The Commission recommends that:

1. Section 18 of the Indian Reorganization Act (25 U.S.C. 478) which provides that no part of that Act shall apply to any reservation wherein a majority of the adult Indians vote against its application should be repealed. In its place Congress enact a savings clause to provide that the rights of any tribe which has organized under the terms of section 16 of the Act or formed a corporation under section 17 of the Act will not be adversely affected.

To accomplish this result the Commission recommends the following specific legislative actions:

(*a*) Repeal section 18 of the IRA which reads as follows:

> This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

(*b*) Insert in place of this section the following language:

> The rights of any Indian tribe which has chosen to organize under sections 16 and 17 of the Indian Reorganization Act shall not be affected by this repeal.

2. Section 16 of the Indian Reorganization Act (25 U.S.C. 476) which authorizes tribes to organize under the provisions of that Act be amended: (1) to reflect specifically the fact that tribes have an inherent right to form their own political organizations in the form which they desire; and (2) to provide that notwithstanding any provisions in existing tribal constitutions which vest the Secretary with authority to review and disapprove ordinances enacted by the tribal government shall only extend to those matters directly related to the trust responsibility over the use and disposition of trust assets. However, those tribes who wish to retain such authority on an interim basis shall be authorized to do so.

To accomplish this result the Commission recommends amendment of section 16 of the IRA along the following lines:

> The right to choose their natural form of government is the inherent right of any Indian tribe. Amendments to tribal constitutions and bylaws adopted pursuant to the Indian Reorganization Act shall be ratified and approved by the Secretary to protect the trust assets and resources of the tribes.
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, said Indian tribe shall also be recognized to have the following rights and powers: To employ legal counsel, to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe; and negotiate with the Federal, State and local governments. The Secretary of the Interior shall advise all Indian tribes and/or their tribal councils of all appropriation estimates of Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.
>
> Notwithstanding the provisions of any existing tribal constitution or similar document which vests authority in the Secretary to review and approve or disapprove proposed actions of said Indian tribes, the Secretary's authority over Indian tribes will only extend or be directly related to the trust responsibility over the use and disposition of trust assets. However, any Indian tribe which may desire a continuation of their presently existing delegation of authority to the Secretary is hereby authorized to do so.

3. Section 2 of title 25, U.S. Code, be amended to provide that the authority of the Secretary of the Interior over tribes shall only extend

to actions relating to protection of tribal trust assets. Within these limits, whenever the Secretary finds it necessary to disapprove a proposed tribal initiative, he must file a written statement with the tribe notifying them of the reason for his disapproval of their proposed action and afford them an opportunity for a hearing.

That section 81 of title 25, U.S. Code, should be amended to accomplish a result similar to that proposed above, i.e., that whenever the Secretary shall disapprove any proposed contract dealing with trust assets, he shall provide the affected tribe or person with a written statement of his reasons for disapproval and provide them with an opportunity for a hearing.

To accomplish these results the Commission recommends amendatory language along the following lines:

(*a*) That 25 U.S.C. 2 be amended to include the following language:

> The authority of the Secretary of Interior over Indian tribes shall only extend to those actions deemed necessary to protect tribal trust assets and resources. In any action which the Secretary finds it necessary to disapprove a proposed tribal government initiative, the Secretary shall take such action within 60 days of having been officially notified of the proposed tribal action by the Indian tribal government and any disapproval of the proposed tribal action shall be accompanied by an opportunity for a hearing on the part of the tribe, and the Secretary's decision shall be based on written findings of fact which shall specify the reasons for his disapproval.

(*b*) That 25 U.S.C. 81 be amended in the following manner: The third paragraph beginning "second * * *" shall read:

> It shall bear the approval of the Secretary of the Interior and Commissioner of Indian Affairs endorsed upon it. The Secretary of the Interior and the Commissioner of Indian Affair shall disapprove any such proposed contract only after finding that the proposed contract shall endanger the trust assets or resources of the tribe or individual Indian. Such findings shall be submittted to the proposed tribe and/or Indian in written form specifying the exact reason for disappproval.

4. Additional legislation be enacted to authorize tribes to override Secretarial disapproval of their proposed use of trust assets. Such an override must be coupled with a waiver of liability on the part of the United States to the limited extent that the override may result in loss.

Legislation be enacted that if the Secretary disapproves a tribal government initiative, a contract or other tribal action involving the use or disposition of a trust asset, the tribe shall be entitled to override such Secretarial disapproval using the following procedures:

(*a*) The Secretary shall supply the tribe with a detailed statement of the reasons for his disapproval of their proposed use or disposition of the trust asset, specifically setting forth the loss he believes may result from such tribal proposal.

(*b*) After due consultation between the representatives of the tribe and the Secretary or his representative, the tribal council may, by formal resolution, elect to override the disapproval of the Secretary. Such resolution must contain a specific waiver of liability on the part of the United States for losses which may result as a direct result of the tribal override.

(*c*) In the consultation process the Secretary shall be held to the highest standards of care and good faith consistent with the principles of common law trust in advising the tribes of the potential consequences of the proposed tribal decision.

(*d*) A tribal override of a Secretarial disapproval shall not diminish the trust character of the asset in question. The trust responsibility of the United States to aid the tribe in the implementation of their decision and to protect the future well-being of the asset shall continue undiminished.

(*e*) In any case in which the Secretary has reasonable cause to believe that the decision of the tribal government may not reflect the will of the majority of the members of a tribe he shall (may) require a referendum of the tribal members, the expense of which shall be borne by the United States and not the tribe.

(*f*) In the event the Secretary determines that a tribal resolution should be put to a referendum, he must notify the tribal council within 30 days of the passage of their resolution, and he must call for such referendum vote not more than 45 days after tendering such notification.

B. THE ASSERTION AND IMPLEMENTATION OF FEDERAL CRIMINAL JURISDICTION

Within the Indian country, there are at least three jurisdictions: tribal, State and Federal. Because Federal statutes in Indian country are preemptive and far reaching, they are discussed separately to assess their impact and effectiveness.

Federal Criminal Statutes

(*1*) *Jurisdictional Overview*

There is a patchwork of criminal jurisdiction within the Indian country[253] which has evolved as a result of Federal enactments and case law exceptions. The first extension of Federal criminal jurisdiction into the Indian country is presently embodied in the enactment of the General Crimes Act, 18 U.S.C. 1152. That Act applied all Federal offenses to the Indian country except for: (1) offenses between Indians; (2) where an Indian has already been punished under tribal law; or (3) where exclusive jurisdiction over a particular offense has been reserved by treaty.

When a Sioux Indian killed one of his tribal fellows in 1881 and was punished by his tribe, the United States Supreme Court held that the Federal Government could not also punish him as it lacked the jurisdiction to do so.[254] Congress responded by passing the Major Crimes Act, 18 U.S.C. 1153, providing for Federal jurisdiction over certain enumerated serious crimes committed by an Indian against any other person. There are presently 14 such enumerated crimes.

During the same period, the Supreme Court decided the first in a series of cases holding where a non-Indian commits a crime against another non-Indian within the Indian country, the local state has exclusive jurisdiction over the offense.

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[253] As defined in 18 U.S.C. 1151.

[254] *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 104 U.S. 240 (1896); and *New York ex rel. Martin v. Ray*, 326 U.S. 496 (1946).

This matrix of jurisdiction was further supplemented by the Supreme Court in 1946 when it decided that the Assimilative Crimes Act, 18 U.S.C. sec. 13, was applicable within Indian country via the General Crimes Act.[255] Although the clear implication of such an application would appear to limit application of the Assimilative Crimes Act to those sorts of crimes contemplated in the General Crimes Act (i.e., violent crimes, not moral laws or victimless crimes), there have been situations where the Assimilative Crimes Act was used against Indian persons within Indian country for violations of State morals or regulatory laws.[256]

It must be conceded that the Assimilative Crimes Act as applied by the General Crimes to Indian country fills a void where Federal laws are not otherwise complete. However, where this application is used by U.S. Attorneys to regulate bingo, or firecracker sales, the application has gone beyond the scope of the General Crimes Act and imposes an unwarranted intrusion of State morals or regulatory laws on Indian tribes and individuals. The Department of Justice has chosen to follow the rationale which is least consistent with Indian sovereignty and allows for the greatest importation of State laws onto the reservation.[257] Actual prosecution, of course, depends upon how willing U.S. Attorneys or their deputies are to prosecute individual cases. Such a situation does not lend itself to uniform application or evenhanded enforcement.[258]

The resultant jurisdictional pattern emerges.

> Except for offenses which are peculiarly Federal in nature, the general criminal jurisdiction of Federal courts in Indian country is founded upon the General Crimes Act (18 U.S.C. sec. 1152) and the Major Crimes Act (18 U.S.C. sec. 1153). The General Crimes Act extends to the Indian country, all of the Federal criminal laws applicable in Federal enclaves, including the Assimilative Crimes Act (18 U.S.C. secs. 7 and 13), and under this statute, the Federal courts may exercise jurisdiction over offenses by an Indian against a non-Indian and offenses by a non-Indian against an Indian. This statute (18 U.S.C. sec. 1152) does not extend to offenses committed by an Indian against the person or property of another Indian nor to an Indian committing any offense in Indian country who has been punished by the local law of the tribe, and because of the exception carved out by the *McBratney* and *Draper* decisions, it does not extend to offenses by non-Indians against non-Indians.[259]

Major Crimes Act

Although the Federal Government acquired jurisdiction to prosecute enumerated serious crimes, there is some question as to whether that jurisdiction is exclusive or is concurrent with the various tribes.[260] The issue has never been specifically tested although those cases referring to the point in dicta have largely assumed the exclusive jurisdiction of the Federal Government. The earliest such case is *United States* v. *Whaley*, 37 F. 14 (C.C. S.D. Calif., 1888) which was decided by the trial court concerning whether a guilty plea should be accepted for manslaughter as opposed to requiring trial for first degree murder. The defendants pursuant to orders from the tribal counsel, had executed a tribal medical man for poisoning several tribal members.

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[255] *Williams* v. *U.S.*, 327 U.S. 711 (1946), footnote 3.

[256] *See, U.S.* v. *Sosseur*, 181 F. 2d 873 (7th Cir. 1950) ; (conviction of an Indian for operating a slot machine) ; Contra, *U.S.* v. *Pakootas*, No. 4777 (D. Ida., N.D. 1963) (Acquittal of Indians participating in a gambling game).

[257] Report of Task Force No. 4, pp. 40–42.

[258] *See*, Justice and the American Indian: "Federal Prosecution of Crimes Committed on Indian Reservations" (1974) vol. 5, Report by the National American Indian Court Judges Association.

[259] P. Taylor, "Criminal Jurisdiction," Manual of Indian Law AILTP, 1975.

[260] *See* Report of Task Force No. 4, pp. 34–47.

The court never addressed the lack of jurisdiction of the tribe to order the execution, but must have assumed such was the case in accepting the manslaughter plea. *Whaley* is, therefore, a very weak authority on the issue of whether the Major Crimes Act withdrew tribal jurisdiction and it does not appear that it was ever cited in any subsequent case for the proposition.

Subsequent cases have commented on the withdrawal of tribal jurisdiction over the enumerated major crimes and have uniformly indicated in dicta that such was the case.[261]

Likewise, the legislative history of the Major Crimes Act, taken together with other Federal jurisdictional acts, indicates that it was the intent of Congress to overcome an inhibition on Federal powers, not to limit tribal powers. Congress was responding specifically to the holding in *Ex Parte Crow Dog*, 190 U.S. 556 (1883) that the Federal forums were foreclosed and the tribe had exclusive powers. Moreover, the lack of express congressional language taken with well-accepted canons of construction concerning Indian rights would mitigate in favor of a finding of concurrent jurisdiction.[262]

It is fair to conclude that there is some question in the area which is susceptible to congressional clarification. Because of the needs of Indian communities which will be discussed below, it is suggested that clarification take form in favor of concurrent jurisdiction.

Major Crimes Enforcement

Of these reservations where States have not undertaken criminal jurisdiction pursuant to Public Law 83–280, United States attorneys were responsible for prosecuting violations of the Major Crimes Act. Eighty percent of the Indian cases presented for prosecution are declined by the office responsible for their prosecution. Thus, the primary, if not sole, source of major crimes enforcement available to these reservations declines to prosecute 4 of every 5 cases brought before it. The effect is devastating, the reasons and considerations are manifold.

There can be no discernible standards against which any decision to prosecute or decline can be measured. Decisions are rarely reported back to tribal officials or police. Prosecutors rely heavily upon agents of the FBI to the exclusion of the BIA and tribal law enforcement officers.

Those closest to the communities and to the scene of any alleged crime are the BIA and tribal police. They are usually first on the scene, and are most proximate in the investigation and in apprehension of the perpetrator. However, where the FBI agent is the only one who can successfully present a case to the prosecuting U.S. attorney, local officers are usually faced with preserving the scene of the crime for an entire reinvestigation by the FBI agent. Time frames awaiting the arrival of an agent may span from hours to days.

Clearly, the hallmark of such a situation is cooperation. No set of regulations or guidelines can obtain the same result. This atmosphere of mutual respect includes the FBI agent as well who was described in testimony at task force hearings as being incorporated into the Warm Springs community as a person as well as a police officer.[263]

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[261] *See Iron Crow* v. *Oglala Sioux Tribe*, 129 F. Supp. 15 (W.D.S.D., 1956 aff'd. 231 F. 2d 89 (8th cir., 1956) *U.S.* v. *LaPlant*, 156 F. Supp. 600 (D. Mont., 1957); *Glover* v. *U.S.*, 219 F. Supp. 19 (D Mont, 1963); *Sam* v *U.S.*, 385 F. 2d 213 (10th cir., 1967).

[262] For an extensive discussion of this matter, *see* Task Force No. 9, app. II, part V, ex. 3.

Where voluntary cooperation is not present and law and policy require the delivery of law and order services, regulations and guidelines can serve to bring at least minimal accountability. Given the historical context of unilateral assumption by this authority and responsibility by the Federal Government it is all the more compelling. A number of factors would require coordination, however, as opposed to any single action.

Primarily, Indian communities require dependable guidelines with appropriate feedback. Optimally, tribal involvement through their police agencies and BIA police personnel in the initial decisions on Federal prosecution would be indicated. Where declinations are the case, the tribal authorities may then make timely decisions on prosecution under tribal laws.

Cooperation and coordination between tribal and Federal authorities are particularly important in view of a decision recently handed down by the United States Court of Appeals for the Ninth Circuit.[264] That court held that where an Indian is tried in an Indian tribal court, he cannot then be tried in a court of the United States for the same offense, as those two courts are arms of the same sovereign and dual prosecution would violate and guarantee against double jeopardy.[265] Even if this decision does not survive appeal, the need for coordination will endure.

General and Assimilative Crimes Act

Early in the evolution of the Nation, there was a hiatus in the application of laws applicable to Federal territories and enclaves.[266] As a result, the Congress passed the Assimilative Crimes Act [267] designed to import the laws of the surrounding State for those crimes for which there was no defined Federal prohibition. The purpose of this Act was to fill a jurisdictional void which existed within enclaves which were under the "sole and exclusive" jurisdiction of the United States. As an analytical matter where tribes have their own scheme of laws within a reservation, there would be no such hiatus.

Not long after the Assimilative Crimes Act, the Congress passed what is now codified as the General Crimes Act.[268] That law was passed to make applicable to Indian country [269] those Federal criminal laws applicable to Federal enclaves generally. It was specifically provided that these laws would not apply to crimes between Indians, where an Indian has been punished by the local laws of the tribe; and those areas of jurisdiction being exclusively reserved to the tribe by treaty.

The issue of applicability of the Assimilative Crimes Act presents a special problem. As indicated earlier, this Act was intended to control behavior in Federal enclaves not otherwise covered by Federal law by importing the laws of the State in which the enclave is located.[270] The problem concerns the scope of the laws imported. In practical terms, it concerns whether enforcement of Assimilative Crimes Act is limited to the violent sorts of crimes contemplated in the General Crimes Act or whether it also imports all of the victimless crimes, largely moral laws, as well.

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[263] See Report of Task Force No. 4, p. 35; Northwest Hearings Transcript at 274–75.

[264] *U.S.* v. *Wheeler*, No. 76–1509 (9th cir., decided Dec. 2, 1976).

[265] This decision was expected in principle and analyzed in a paper prepared by the Indian Civil Rights Task Force, Office of the Solicitor, Department of the Interior, Fall 1972, contained in Final Report of Task Force No. 9, app. II, part V, exh. 3, p. 252 at 272. See also, sec. A.1 of this report, "Sources of Tribal Power" for an analysis of the problems in treating Tribal Governments as instrumentalities of the Federal Government.

[266] 18 U.S.C. sec. 7.

[267] 18 U.S.C. sec. 13.

[268] 18 U.S.C. sec. 1152.

[269] 18 U.S.C. sec. 1151.

It is clear that the Department of Justice has vacillated on this issue, asserting only on rare occasion that general state laws are applicable to Indians within the Indian country.[271] It was not until 1946 that the Supreme Court even decided that the Assimilative Crime Act was applicable within Indian country.[272] In 1950, the Act was relied upon by the Department of Justice in prosecuting an Indian for operating slot machines on an Indian reservation.[273] There are few, if any, cases decided since Sosseur in which the Department of Justice relied upon the Assimilative Crimes Act to obtain a conviction of an Indian in Federal court. Yet, that Department continues to assert that the Act is generally applicable to Indians within Indian country.[274]

It has been a continuous tenet of Federal-Indian policy to leave tribes free to govern themselves under their own code of laws within the Indian country. The wholesale adoption of State laws onto reservations by way of the Assimilative Crimes Act runs completely counter to that long standing Federal policy. It is the tribe, not the State or the Federal Government, which should determine whether Indian stick games may be played within the reservation, whether bingo games will be sanctioned, whether firecrackers may be sold within the reservation.[275] It may well be that Congress would want to control certain activities of a more substantial nature, but this should be done by specific legislation and only after a showing that the tribes themselves have failed to pass regulatory laws.

Recommendations

The Commission recommends that:

1. The Department of Justice issue regulations or orders directing U.S. attorneys to accept criminal referrals from qualified tribal and/or BIA police or investigators.

Congress hold oversight hearings to see that this recommendation is accomplished or receive an explanation why it should not be done.

2. Congress hold oversight hearings with representatives of the Department of Justice, BIA and tribal authorities, particularly police and judges to inquire into the jurisdictional relationship of the tribal and Federal courts and ascertain what legislation, if any, is needed as a consequence of this decision.

3. Congress hold oversight hearings with representatives of the Department of Justice and Interior and with Indian tribal authorities to ascertain the scope of this problem.

4. Corrective legislation, if any is needed, must be premised on the continued protection of tribal self-government. The scope of the appli-

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[270] *See U.S.* v. *Sharpnack*, 335 286 (1958).

[271] *See* Report of Task Force No. 9, Law Revision, pp. 78–82.

[272] *Williams* v. *U.S.*, 326 U.S. 711 (1946).

[273] *U.S.* v. *Sosseur*, 181 F. 2d 873 (7th cir., 1950).

[274] Paper delivered by Roger Adams, Phoenix, Ariz., U.S. Attorney's Conference on Indian Matters, January 27–29, 1975. It is instructive to note that the author of that paper takes the view that narrow construction of the exceptions in the General Crimes Act is appropriate "so that . . . Indians committing such offences against the 'community' can be prosecuted in Federal Court." That position is especially interesting in view of the history of the Acts involved reflecting a desire to control behavior of non-Indians in the Indian country, not Indians vis-a-vis the non-Indian community.

[275] *See* Report of Task Force No. 9, pp. 78–82.

cation of the Assimilative Crimes Act must be strictly limited. It must be recognized and accepted that the laws of the tribes will not always conform to the laws of States in which their reservation lies. This is the meaning of self-government.

C. PUBLIC LAW 280

Overview

Passed by Congress during the termination fever of the 1950's, Public Law 83–280 provided for the transfer to States of major components of the jurisdiction that the Federal Government has assumed with respect to Indian tribes.[276] Some States were required to accept the jurisdictional transfer. Other States were permitted to assume jurisdiction by affirmative legislative action. Congress specifically did not permit any transfers of jurisdiction to States in the area of hunting, fishing, or trapping rights or the alienation or taxation of trust property. In addition, in the civil area, States were only permitted to extend laws of general application to Indian tribes.[277]

Public Law 280, which is a major incursion on tribal sovereignty, did not when passed provide any voice to the major affected parties—the tribes—the jurisdictional transaction had only two actors, the Federal Government and the State. In 1968, Congress provided for tribal consent before any further jurisdictional transfers were to occur.[278] This consent provision has had no remedial value for voiceless tribes who were made subject to State jurisdiction during the intervening 14 years. In 1968, Congress also amended the basic law to allow for retrocession—the return of jurisdiction from States to the Federal Government.[279] Once again, the major affected parties, the tribes, were completely left out of the decisionmaking process, the transaction is exclusively between the States and the Federal Government.

Public Law 280 is a failure of Federal policy on many levels. Of prime importance is the fact that its simple existence is an affront to tribal sovereignty; to the historical relationship between tribes and the United States, which deliberately excludes States; and to current Federal policy of Indian self-determination. The Act is also a factual failure. It was premised on notions of fostering the individual assimilation of Indians which it has not achieved; of providing adequate and just law enforcement and other services on Indian reservations, which it has not achieved; and of removing oppressive BIA paternalism, which it also has not achieved.

The current controversies surrounding Public Law 280 narrow down to one basic question: Should the effects of Public Law 280 be removed and if so, how? It is the view of the Commission that the answer is yes and the method is flexible retrocession at tribal option.

Legislative History of Public Law 280

Several factors converged in the 1950's to produce Public Law 280.[280] The termination fever referred to previously reflected itself in House Concurrent Resolution 108 which announced a congressional policy to end the traditional Federal-Indian trust relationship, and to integrate American Indians, individually, into American society on an equal footing with other citizens[281]—in effect, to destroy the political existence of Indian tribes. A piecemeal way of ending the federal relationship was for the Federal Government to divest itself of its authority and hence its responsibility. The States, which in the Meriam Report[282] were viewed as better providers of services than the Federal Government, were in this context the natural recipients of this divested authority. A curious footnote to this transfer was that the Federal Government provided the States with no supplemental funds to undertake their new responsibilities. A related issue supporting the Federal desire to divest itself of responsibility was the significant dissatisfaction with the performance of the Bureau of Indian Affairs, the Federal Government's prime agency in Indian affairs. Dissatisfaction came from many sources. Felix Cohen in 1948 published a blistering attack on the inadequacies of the Bureau.[283] Indian people were also often severely critical of the Bureau. The difference between the Indian position and the view adopted by Congress, however, was that Indians wanted to see the Federal responsibility effectively and meaningfully performed, not abolished.

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[276] Codified as 18 U.S.C. § 1162 and 28 U.SC. § 1360.

[277] *Bryan* v. *Itasca County*, 96 S. Ct. 2102 (1976).

[278] 25 U.S.C. § 1321–1326. The Act also provides for retrocession of jurisdiction to the Federal Government by States.

[279] Ibid.

[280] *See* AIPRC Task Force 4 Report, Federal, State and Tribal Jurisdiction, pp. 4–5.

Also in the late 1940's, a movement developed within Congress to resolve conflicts between the City of Palm Springs and the Agua Caliente Band of Indians over economic development issues. This movement resulted in 1949 in specific legislation which transferred Federal jurisdiction, both civil and criminal, with respect to the Agua Caliente to the State of California.[284] This Act was a precursor to Public Law 280.

Perhaps the most frequently expressed reason for Public Law 280 in the congressional forum was the perception that there was a "hiatus of criminal law enforcement on Indian reservations."[285] Complaints concerning the quality of law enforcement on Indian reservations were multiple and of different influences, for example, the multiplicity of laws that were felt to apply depending on who was the victim and/or perpetrator of the criminal act; the distance and inefficiency of Federal police providing rural services on dispersed reservations; the lack of efficient justice (in the common law sense) for Indians from tribal governments; and the cost of the Federal provision of law enforcement services. A major thrust of the argument over criminal law enforcement seems, however, to have been congressional concern for non-Indians.

Status of Public Law 280 Implementation

There is considerable variation in Indian country as to the jurisdiction different States have assumed under Public Law 280. In addition, some States have asserted jurisdiction over tribes on the basis of other Federal statutes and in some instances without benefit of any statutory authority. Without the Federal statutory basis, States' assertions of jurisdiction have no legal viability.[286] The following chart summarizes by State the current state of jurisdictional transfers.

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[281] 83d Congress, 1st session (1953).

[282] "The Problems of Indian Administration", Meriam & Associates, 1928.

[283] The Erosion of Indian Rights, 1950–53: "A Case Study in Bureaucracy" 62 Yale Law Journal 348 (1954).

[284] The Act of October 5, 1949, 63 Stat. 705.

[285] Rept. No. 848, 93d Congress, 1st sess. (1953).

[286] *See Kennerly* v. *Dist. Court*, 400 U.S. 423 (1971).

State	Status re Public Law 280	Other assumption of jurisdiction	Case law development/ validity of assumption
Alaska	Full assumption of jurisdiction except for Mettakaite Reservation over which criminal jurisdiction is not asserted.		
Arizona	Assumption of jurisdiction only over air and water pollution.		
California	Full assumption of jurisdiction.		
Colorado	No jurisdiction		
Florida	Full assumption of criminals and civil jurisdiction.		
Idaho	Assumption of jurisdiction in the following areas: Compulsory school attendance; Juvenile delinquency and youth rehabilitation; Dependent, neglected, and abused children; Insanities and mental illnesses; Public assistance; Domastic relations; Operation and management of motor vehicle upon highways and roads maintained by the county, or State, or political subdivision thereof.		
Iowa		Limited criminal jurisdiction re Sac and Fox pursuant to act of June 30, 1948, ch. 759, 62 Stat. 1161.	
Kansas	No jurisdiction	Criminal jurisdiction pursuant to act of June 8, 1940, ch. 276, 54 Stat. 249.	
Louisiana	do		
Maine	do	Issue open to question, re Federal recognition of previously only State recognized tribes.	
Michigan	do	State asserts historically; no apparent legal basis.	
Minnesota	Full assumption of jurisdiction except for the Red Lake Reservation, and criminal jurisdiction has been retroceded over Bois Forte—Nett Lake Reservation.		
Mississippi	No jurisdiction		
Montana	Assumption of limited civil and criminal jurisdiction on Flathead Reservation in the following areas: Compulsory school attendance; Public welfare; Domestic relations (except adoptions); Mental health and insanity; care of the infirm, aged, and afflicted; Juvenile delinquency and youth rehabilitation; Adoption proceedings (with consent of tribal court); Abandoned, dependent, neglected, orphaned or abused children; Operation of motor vehicles upon public streets, alleys, roads, and highways.		McDonald v. District Court 496 p. 2d 78 (Mont. 1972) court held constitutional disclaimer amendment and that statutory action was sufficient. Kennerly v. District Court of 9th District of Montana, 400 U.S. 423 (1971). Consent provision of the 1968 amendments literally construed to void tribal council consent where statutory language referred majority of the tribe.
Nebraska	Full assumption of jurisdiction that criminal jurisdiction (excluding traffic) retroceded to Federal Government for Thurston County portion of Omaha Reservation.		U.S. v. Brown, 334 F. Supp. 536 (1971), and Omaha Tribe of Nebraska v. Village Walthill 460 D. 2d 1327 (1972). The Secretary of the Interior has discretion to accept less than a State offers to retroceded. Robinson v. Wolff, 468 F. 2d 438 (1972), Public Law 280 held not to be an unconstitutional delegation of power reserved to the Federal Government.

State	Status re Public Law 280	Other assumption of jurisdiction	Case law development/ validity of assumption
Nevada	Originally asserted over some reservations. Now retroceded for all reservations, except, for Ely Colony.		
New Mexico	No assumption pursuant to Public Law 280.	Claim of criminal jurisdiction re particular felony crimes pursuant to New Mexico Constitution art. 19. sec. 14. No apparent legal basis to State claim.	
New York	do	State jurisdiction pursuant to act of Sept. 13, 1950 ch. 947, 64 Stat. 845.	
North Carolina	do	Full jurisdiction assumed by State pursuant to citizens of state provision of the treaty of 1835, and by court decision Eastern Band of Cherokee v. U.S. and Cherokee Nation, 117 U.S. 288 (1886).	
North Dakota	Civil jurisdiction extended where tribe or individual Indian consents. No tribal consent—individuals have consented.	Criminal jurisdiction on Devils Lake Reservation, pursuant to act of May 31, 1946, ch. 279, 60 Stat. 229.	
Oklahoma	No jurisdiction pursuant to Public Law 280.	Jurisdiction exercised in all matters pursuant to various Federal statutes.	
Oregon	Full assumption of jurisdiction except for Warm Springs Reservation.		
South Dakota	No jurisdiction. Attempt at assumption defeated in statewide referendum vote in 1966.		
Utah	No jurisdiction. State has passed a statute establishing tribal consent mechanism for assumption.		
Washington	Assumption of jurisdiction is piecemeal and varies per individual tribe: 1. State assumed full civil and criminal jurisdiction with respect to—Colville, Chehalis, Nisquaily, Mackleshoot, Quileute, Skokomish, Squaxin Island and Tulalip. 2. State assumed full criminal and civil jurisdiction on fee patented lands re Swonomish. 3. State has assumed civil and criminal jurisdiction with respect to only nontrust land, in the following areas: (a) Compulsory school laws; (b) Public assistance; (c) Domestic relations; (d) Mental illness; (e) Juvenile delinquency; (f) Adoptions of minors; (g) Dependent: Status; (h) Motor vehicle operations on public roads. On the following reservations: Hoh, Kalispel, Lower Elwha, Lummi, Makah, Nooksack, Port Gamble, Port Madison, Puyallup, Quinault, Shoal Water, Spokane Retrocession of some with respect to Port Madison Reservation.		Quinault v. Gallagher, 368 F. 2d 648 (9th cir. 1966), 387 U.S. 907 (1967). Defers to State court determination of what State action is necessary to assert jurisdiction pursuant to sec. 6 of Public Law 280 when a State constitutional disclaimer exists. See also State v. Paul, 53 W. 2d, 789; 337 P. 2d 33 (1959) abd Makah Tribe v. State, 76 W. 2d 645, 457 P. 2d 590 (1969).
Wisconsin	Full assumption of jurisdiction except that jurisdiction has been retroceded over the Menominee Reservation.		
Wyoming	No jurisdiction		

Controversies Concerning the Scope of State Jurisdiction

Over the years since the passage of Public Law 280, there has been significant litigation which to a large extent has narrowly defined the scope of jurisdiction that States obtained pursuant to Public Law 280. The controversies generally have arisen in three areas: hunting and fishing rights; land use controls; and taxation.

Public Law 280 is quite clear on its face that States were not given any power to deprived Indians of "any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, or regulation thereof."[287] Nevertheless, this area has produced much emotionalism, concern, and litigation. The Federal courts, unlike the States, have not had much difficulty ascertaining whether the States had received any grant of jurisdiction in this area. The developing case law is uniquely consistent in favor of Indian hunting and fishing rights free from practically all State intrusion.[288]

The area of land use controls—zoning, building codes, and the like—has been a significant area of controversy between the tribes and the States. If States and their municipalities were able to control this area of regulation, they would possess enormous power over the uses and economic potential of Indian lands. Several sections of Public Law 280 are pertinent to this area. As noted above, States in the civil area are only permitted to apply laws of general application to Indian tribes, and are specifically not permitted to alienate or encumber Indian trust property. The courts, therefore, have had to focus on interpreting these concepts in factual contexts. The early case law results were mixed, with several Federal district courts in California upholding the application of local-municipal laws on reservations.[289] Recently, however, the Ninth Circuit ruled on this issue in a definitive manner.[290] A unanimous three-judge panel held that Public Law 280 was only a grant of jurisdiction to apply State law, not local law, and that the zoning ordinances in the particular case were encumbrances upon trust property.

Taxation is perhaps the most vexing problem within the Public Law 280 context. State and local governments, which generally have been under increasing economic pressure in the last several decades, have recently focused on producing tax revenues from Indian tribes. States and municipalities are required to provide to individual Indians the same services that they provide to citizens generally. In spite of the significant Federal contribution to State services generally, and substantial moneys that specially provided for Indians, some States perceive themselves with respect to Indians as service providers without a revenue base. A literal reading of the exemption against taxation of Indian trust property contained in Public Law 280 should have precluded any State activity. Where there is economic need, however, there will be attempts at producing income generating exceptions.

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[287] *See* note 1, supra.

[288] For an excellent analysis, *see*, C. A. Hobbs, "Indian Hunting and Fishing Rights". 32 G.W. Law Review 504 (1964).

[289] *See, Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S. D. Calif. 1971) vac'd (other grounds), 496 F. 2d 1 (9th cir., 1974); *Madrigal v. County of Riverside*, 496 F. 2d 1. (9th cir., 1974); *Agua Caliente Band of Mission Indians v. City of Palm Springs*, 374 F. Supp. 42 (C.D. Calif. 1972).

[290] *Santa Rosa Band of Indians v. Kings County*, 532 F. 2d 655 (9th cir. 1975).

A recent Supreme Court decision, however, has made clear that States have no inherent right to tax Indian property.[291] The court specifically held that Public Law 280 did not provide the States with a congressional grant of authority to tax.

Indian Opinion of Public Law 280

Although there are diverse viewpoints among the tribes on the reasons why State jurisdiction assumed under Public Law 280 is inappropriate, there is overwhelming support among the tribles that at least some, if not all, State jurisdiction over Indian reservations be removed.[292] Many tribal leaders cite Public Law 280's impact as having "eroded tribal sovereignty" as a prime reason for providing for an Indian initiated retrocession system. Of the other reasons given by Indians against the State retention of jurisdiction, the lack of either effective or fair law enforcement is most frequently mentioned. Of the various reasons for Public Law 280, a major acknowledged impetus for granting criminal jurisdiction to States was perceived as "lawlessness" on and near Indian Reservations.[293]

The allegations concerning law enforcement fall into two general categories: the lack of adequate or any law enforcement services and discriminatory treatment where law enforcement services are performed.

The lack of law enforcement services is in part attributable to the rural, isolated character of many Indian reservations, and their distance from county and State law enforcement offices. These same factors effect law enforcement in rural, isolated non-Indian communities. Another factor in the lack of services, in the view of some, is non-Indian antagonism. Many tribes related experiences that indicated that police would only respond to calls when their role would be to protect non-Indians, but would not respond either at all or effectively when their role was to protect Indians.[294] Perhaps more serious than the allegations of absent police are the allegations of discriminatory treatment of Indians by the entire panoply of law and justice agencies. Discriminatory treatment ranges from disproportionate arrest rates, inequities in sentencing practices, to allegations of extreme brutality. These allegations are not new.[295] They are common complaints from most areas—border towns, urban areas, etc.—wherever Indian people are found. What Public Law 280 does in this context is provide the State and county law enforcement and justice systems with increased access to Indians.

Although much of the focus of complaints with respect to State services has been law enforcement, the complaints also extend to most other social services.

Even if it were possible for the States to provide nondiscriminatory services to the Indian reservations located within their boundaries, Public Law 280 would still be opposed by most tribal groups. Tribes, for the most part, did not consent to allowing States any jurisdiction. Since the addition of the consent provision in 1968, no tribe has consented to State jurisdiction. Public Law 280 also embodies the assimilation philosophy which the tribes have steadfastly resisted and fought:

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[291] *Bryan* v. *Itasca County*, supra, note 2.

[292] Senate Indian Affairs Subcommittee hearings on S. 2010, Dec. 3 and 4, 1975, part I; *see also* AIPRC Task Force 4 Report, pp. 15–20.

[293] *See* Goldberg, C., "Public Law 280: The Limits of State Jurisdiction over Reservation Indians", 22 UCLA L. Rev. 535, at 541 (1975).

[294] *See* AIPRC Task Force 4 report. Extensive testimony to this effect was documented., pp. 15–20.

[295] Ibid.

> They (the State) want the control but they don't know how to handle it and they want to put all of us Indians into a category and assume that if we stick around long enough, we will soon be white, and if—they want to throw us into that melting pot and we are just basically telling them to go to hell. We don't go for that.[296]

Although the court decision has gone far in clarifying the limitations of State jurisdiction in the Public Law 280 context, it is still anticipated that the mere presence of Public Law 280 will continue to provide the States with the veneer of authority. This veneer of authority has been extremely costly to the tribes. Litigation in the Public Law 280 States has cost millions of dollars in attorneys' fees. The conflict between the Agua Calientes and the City of Palm Springs alone has consumed a half million dollars in legal expenses. The Colvilles expend approximately $100,000 per annum in legal fees to protect tribal interests from State intrustions. The States still show no signs of abating this behavior; [297] the forums for opposing tribal interests, however, show some signs of expansion.[298]

The continual need to fight State attempts at regulation of tribal interests is seen by many tribal officials as a serious handicap in pursuing their economic and development plans. Lucy Covington, then council member of the Colville Tribe of Washington, put it this way:

> * * * we cannot fulfill completely our dream of developing our reservation to the fullest extent possible as long as the cloud of Public Law 280 hangs over our heads.[299]

Nationally, the Indian position on Public Law 280 has been the subject of much discussion and significant hard work at developing solutions. The National Congress of American Indians has been consistent in its opposition to Public Law 280's unilateral transfer of jurisdiction to States. Frequent resolutions at NCAI conventions have addressed the issue.[300] Other national groups have almost uniformly attacked Public Law 280 and the termination philosophy underlying it. At the NCAI convention in San Diego in 1974, there began a major Indian effort to develop a unified position and a mechanism for repealing the effects of Public Law 280. Several meetings were held in Denver involving hundreds of tribal representatives which resulted in a draft retrocession bill. This bill was introduced as S. 2010 by Senator Jackson in June, 1975, and since that time, major tribal support has coalesced behind the bill. Mel Tonasket, president of NCAI, described the bill as reflecting:

> * * * a consensus of all the Indian tribes in America. That consensus is no accident. It was achieved only through great effort and expense.[301]

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[296] AIPRC Task Force hearings, Mar. 1976. Testimony of Louis LaRose, Winnebago Tribe, Midwest transcript, at 409.

[297] AIPRC Task Force 4 report, p. 25.

[298] Ibid.

[299] Supra note 17, S. 2010 hearings, at p. 110.

[300] AIPRC Task Force hearings. Testimony of Richard Balsiger, Montana transcript, at p. 118.

[301] Supra note 17, S. 2010 hearings, at p. 12.

The support for retrocession as reflected in S. 2010 or as a general proposition is not limited to tribes in States where Public Law 280 has been operative. Frank Tenorio, Secretary-Treasurer of the All Indian Pueblo Council, expressed such support in the following manner:

> Public Law 280 has no effect on any Indian tribes in New Mexico unless a tribe wishes to allow the State such jurisdiction. But even though the tribes of New Mexico enjoy all the power of self-government, it is still important to them that the strength of self-government depends in part on the exercise of governmental powers by all Indian tribes. This insures generally applicable case law and consistent legislation. The efforts of the two national Indian organizations, in concert, along with Indian out-put throughout the nation has come out with legislation that is the Indian position.[302]

Non-Indian Opinion

While there is little diversity of viewpoint among the tribes concerning whether Public Law 280 should be subject to tribally initiated retrocession, the divergence among the non-Indian community is extreme. On one side of the issue are some non-Indians, many of whom have economic interests on or near reservations, who are extremely vocal in opposing any removal of state jurisdiction from Indian reservations. The argument favoring the retention of Public Law 280 and perhaps extending more State control over Indian reservations is intimately intertwined, with the notion that Public Law 280 somehow precludes tribal jurisdiction generally and jurisdiction over non-Indians specifically. The major concern therefore appears to be the "the threat" of Indians exercising some control over the behavior and economic interests of non-Indians on Indian reservations. In extremis, this viewpoint argues for the destruction of reservations and the termination of tribal governmental identity. Somewhere in the middle of the spectrum of views on Public Law 230 are non-Indian persons, as well as some Indian persons who simply wish to see the jurisdictional confusion settled once and for all. Some of these people reject the idea that Indian and non-Indian governments cannot concurrently operate, and reject the notion that government efficiency requires one or the other to have sole control, particularly in the area of land use control and planning. At the other end of the spectrum appear to be some non-Indians who, as a matter of social philosophy or practical experience, favor the total repeal of Public Law 280.

Those non-Indian persons, as well as some Indian persons who support Public Law 280 and oppose retrocession in any form argue that retrocession:

> * * * will be violating our rights guaranteed by the Constitution and Bill of Rights. Specifically you (Congress) will be recognizing a sovereign Nation within the confines of the continental United States, the very heart of this great country, and in the Bicentennial year at that.[303]

The major constitutional right that they believe will be violated is that non-Indians are generally prohibited from participating, through the voting franchise, in the tribal government. This situation is complicated by the demography of some Indian reservations, the strongest opposition to the exercise of tribal authority appears to come from those areas where Indians have their reservations. The above quote is from a resident of Thurston County, Nebraska, which is totally encompassed by either the Winnebago or Omaha Reservations.

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[302] Ibid. at p. 139.

[303] Senate Indian Affairs Subcommittee hearings on S. 2010, Mar. 4 and 5, 1976, part 2, at p. 565.

Another reason for some opposing retrocession is the view that reservations were to be transitional entities and that tribes should be terminated. This argument as with many termination or assimilationist positions is phrased as an argument for extending "full citizenship" to individual Indians.

Coupled with these arguments is the belief that being subjected to tribal jurisdiction [304] will both preclude fair justice and defeat Indian-non-Indian conflict.

> A non-member has a distinct fear that his authority and power to impose fines and penalties upon the non-member would be used as profit-raising and engendering the situation where the fine that they paid into the tribal courts would be distributed out into the pro rata annual payment. I think this fear is well-founded. I don't know that it would be applied. But I do know this, that if S. 1328 or its companion S. 2010 or any of an allied type bill is passed, that * * * it would engender a situation that would make Wounded Knee look like a baseball game.[305]

Mrs. Elizabeth Morris, treasurer of the Quinault Property Owners Association most of whose members live within the boundaries of the Quinault reservation over which partial jurisdiction has been retroceded, testified that fee patent owners on the reservation opposed retrocession because of the economic uncertainty and hardship it has caused.

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Mrs. Morris and others in the several Public Law 280 States placed the blame for their problems on the Federal Government. Testimony is replete with references to being misled [306] when they or their ancestors purchased land within the boundaries of Indian reservations or reservations that would soon be terminated. Others who apparently knew that they were locating in Indian country seemingly had no factual or legal idea as to what that meant.

Other persons who tend to be somewhat less vocal or emotional in their view, but who oppose retrocession or the removal of State jurisdiction, seem to focus on the jurisdictional ambiguities that they believe retrocession would cause. Fred Mutch, the mayor of Toppenish, Wash., a predominantly non-Indian community located within the exterior boundaries of the Yakima Reservation, opposed the removal of State jurisdiction, citing the developing system of concurrent tribal State-city-county jurisdiction as not being perfect but preferable to the situation some 20 years prior.

The mayor of Palm Springs, Calif., which has been in continual land use jurisdictional disputes with the Agua Caliente Band,[307] opposed removal of jurisdiction on the basis that only one government could, within the same geographic boundaries, provide the land use planning and zoning necessary to the economic vitality of the city of

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[304] Public Law 280 or retrocession neither removes nor grants tribal jurisdiction over non-Indians.

[305] AIPRC Task Force hearings. Testimony of F. L. Ingraham. South Dakota transcript, at p. 36.

[306] Ibid. at p. 113.

[307] AIPRC Task Force hearings. Testimony of Bill Foster, Southern California transcript, vol. 1, at pp. 81–83.

Palm Springs, and that should be the municipal government of the city of Palm Springs, representing all interests and having expertise.

The notion that tribes will not respect the environment and will be irresponsible in the exercise of jurisdiction permeates the views of others:

> Theoretically at least, it would be possible to have installed in the finest residential area of a city a meat packing plant, glue factory or something of this nature.[308]

And, finally, there are those non-Indians who support retrocession unabashedly; interestingly, they cite the same adherence to basic American principles as do those persons opposing tribal jurisdiction.

> It is inconceivable to me that any nation be denied the right to self-determination, and in fact, it is still being denied here. We espouse liberty, yet we deny liberty * * *. It is imperative in this Bicentennial year that we reaffirm the principles that have made this Nation a leader among nations.
>
> * * * on a more practical vein it is essential that jurisdiction be returned at least to the Confederated Tribes of the Umatilla Indian Reservation. Our country consists of 3,200 square miles and our reservation is some 285,000 acres. Within these vast areas state and county law enforcement simply cannot provide the protection it ought to be providing. This applies both to the Indian and to the non-Indian living or passing through the reservation. Every law enforcement official in Umatilla County is aware of these problems and most of them have taken the opportunity to wholeheartedly endorse a return of jurisdiction to the Confederated Tribes.[309]

Recommendations

The Commission recommends that:

Legislation be passed providing for retrocession adhering to the following principles:

(1) Retrocession be at tribal option with a plan.

(2) A flexible period of time for partial or total assumption of jurisdiction, either immediate or long term, be provided.

(3) There should be a significant preparation period available for those tribes desiring such, with a firm commitment of financial resources for planning and transition.

(4) There be direct financial assistance to tribes or tribally designated organizations.

(5) LEAA be amended to provide for funding prior to retrocession for planning, preparation or concurrent jurisdiction operations.

(6) Provisions be made for Federal corporate, or charter status for intertribal organizations (permissive, not mandatory).

(7) There be tribal consultation with State and county governments concerning transition activities (no veto role, however).

(8) The Secretary of the Interior:

- (*a*) Act within 60 days on a plan or it is automatically accepted;
- (*b*) Base nonacceptance only on an inadequate plan;
- (*c*) Delineate specific reasons for any nonacceptance;
- (*d*) Within 60 days after passage of the Act, the Secretary of the Interior draft detailed standards for determining the adequacy

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[308] AIPRC Task Force 4 report, exhibit 26.
[309] Supra note 28, at pp. 563–564.

or inadequacy of a tribal plan. Such standards shall be submitted to Congress who shall have 60 days to approve or disapprove such standards.

(9) Any nonacceptance of retrocession by the Secretary of the Interior be directly appealable to a three judge district court in the District of Columbia; and

The Department of Interior be obligated to pay all reasonable attorney fees as determined by the Federal court, except where such appeal is deemed by the court to be frivolous.

(10) Once partial or complete retrocession is accomplished, the Federal Government be under a mandatory obligation to defend tribal jurisdiction assertions whenever any reasonable argument can be made in support of them.

This recommendation is supported in concept by task forces 2, 4, 7, and 9.

It is also supported by most tribal groups, and national Indian organizations such as NCAI and NTCA. The special report of Northwest Affiliated Tribes directly supports the recommendation; other tribal reports also lend credence to the recommendation. The recommendation in major ways parallels S. 2010, which was drafted with major Indian input under the auspices of the National Congress of American Indians.

The difference between this recommendation and S. 2010 relates primarily to financial and technical support prior to retrocession, and restrictions on Secretarial discretion.

Since the 1968 amendment provided for a retrocession process, retrocession has occurred in five situations. The experiences of those tribes that participated in retrocession strongly indicates a need for resources from the beginning. Some tribes with existing justice systems probably can immediately move into a full retrocession situation. Other tribes may have the need for preparation, planning, training and long term piecemeal implementation. A significant problem identified in both the Nevada retrocession experience and the Menominee restoration/retrocession experience is the indefinitiveness that occurs during the transition period. This transition needs to be planned for, and the States and counties need to be consulted with so that they understand whatever responsibilities they may retain and/or at what point their responsibilities in part or in full may end. Many of the smaller tribes indicated that they may wish to retain certain functions of the States and counties, and only seek partial retrocession. In these divergent situations, consultation is essential.

In the Nevada retrocession situation, approximately 1 year passed from the time the State offered to retrocede and the time that the United States accepted. In this intervening period, great uncertainty occurred. Litle or no funds were made available to the Nevada tribes to plan for transition, and when the United States accepted the retrocession offer, retrocession occured immediately leaving the tribes ill-prepared. This situation argues for both limitations on the actions of the United States and for significant preparation and transition assistance.

D. THE 1968 CIVIL RIGHTS ACT: IMMUNITY, JUDICIAL REVIEW, AND MUTUALITY

In 1968, Congress, for the first time, enacted legislation specifically imposing restraints upon the operations of tribal government.[310] During this time, there were virtually no statutory guidelines of constitutional restraints upon the governments of the tribes.[311] Title II of the 1968 Civil Rights Act tracked the provisions of the first 10 amendments to the United States Constitution with certain minor, but significant, differences. The provisions of title II are as follows:

> SEC. 202. No Indian tribe in exercising powers of self-government shall—
>
> 1. make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
> 2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> 3. subject any person for the same offense to be twice put in jeopardy;
> 4. compel any person in any criminal case to be a witness against himself;
> 5. take any private property for a public use without just compensation;
> 6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witness in his favor, and at his own expense to have the assistance of counsel for his defense;
> 7. require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
> 8. deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law;
> 9. pass any bill of attainder or ex post facto law; or
> 10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
>
> SEC. 203. The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

The primary difference between this legislation and the Bill of Rights lies in: (1) the omission of language prohibiting the tribal governments from the establishment of religion; (2) specifically providing that persons in criminal proceedings may be represented by counsel retained at their own expense; (3) the limitations imposed upon the penal powers of Indian tribes in criminal proceedings; and (4) the provision extending to any person accused of an offense punishable by imprisonment the right to a trial by jury.

Enactment of this legislation followed some 7 years of hearings and consideration by the Senate Subcommittee on Constitutional Rights. Despite the long gestation period, it appears the legislation was enacted with some haste as an amendment to the General Civil Rights Act of 1968.[312]

The Indian titles of the 1968 Civil Rights Act (titles II through VII) are an amalgam of some eight Senate bills and one Senate resolution introduced in the first session of the 89th Congress.[313] S. 961 would have simply provided "that any Indian tribe * * * shall be subject to the same limitations and restraints as those which are imposed on the Government of the United States by the United States Constitution." S. 962 would have provided any person convicted in an Indian court who claimed a deprivation of a constitutional right a right of appeal to the U.S. district court with a trial de novo. And S. 963 would have authorized and directed the Attorney General of the United States to receive and investigate any written complaint filed by an Indian who alleged deprivation of any right conferred upon a citizen of the United States either by the laws or the Constitution of the United States, and upon finding of such a deprivation, would have authorized and directed him to institute such legal proceedings as might be necessary to vindicate that right.

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[310] Title II, Act of Apr. 11, 1968, 82 Stat. 77 (25 U.S.C. 1302, 1303).

[311] *See* discussion part A of this chapter, Legal Status of Tribal Governments, pp. 14–15.

[312] Burnett, A Historical Analysis of the 1968 "Indian Civil Rights Act", 9 Harv. J. Leg. 557 (1972).

When the legislation was finally enacted, the sweeping general application of the United States Constitution to tribal governments was dropped in favor of statutorily defined rights and limitations paralleling the provisions of the first 10 amendments to the U.S. Constitution but modified to fit the tribal circumstances; the general right of appeal with trial de novo was dropped in favor of an abbreviated provision extending the privilege of the writ of habeas corpus to any person to test the legality of his detention by order of an Indian tribe; and the provisions of S. 963 authorizing the Attorney General to investigate complaints of deprivation of rights and bring legal actions were dropped entirely.

The 8-year history of this legislation has revealed several problems. Three of the task force reports devoted extensive consideration to these problems and numerous recommendations were posed.[314]

Among the problems discussed are the following:

1. Despite the fact the jurisdictional provision for review in Federal court is limited to habeas corpus, the courts have in fact taken jurisdiction over a nearly limitless range of complaints including election disputes, apportionment of voting districts, membership rights, conduct of tribal officials in their official dealings which may exceed the authority vested in them under tribal constitutions or may deviate from procedures required by such documents, procedures involving assignments of tribally owned property for individual use, orders of tribal councils excluding certain nonmembers from the reservation. On the other hand, other decisions have dismissed complaints involving similar issues as being internal political disputes beyond the jurisdiction of the court. While the courts have been unanimous in ruling that their jurisdiction is not limited to habeas corpus, there clearly appears to be confusion as to the correct reach of their jurisdiction.

2. The courts have been inconsistent in their holdings as to the legal standards which should be applied to the actions of tribal governments. A few courts have held that the Act simply made applicable to the tribes the provisions of the Bill of Rights of the U.S.

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[313] S. 961 through S. 968 and S.J. Res. 40, 89th Cong., 1st sess. For the text of these bills and the resolution, see hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, held June 22, 23, 24 and 29, 1965. For a discussion of jurisdictional problems arising from P.L. 83-280, see particularly the Summary Report on the Constitutional Rights of the American Indian, prepared by the staff of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 6-14 (1964).

[314] Task Force No. 2, pp. 27-37; Task Force No. 4, pp. 129-149; Task Force No. 9, pp. 37-45, 87-91 and 323-330.

Constitution. However, the better reasoned cases and the weight of authority has taken the view that the Act did not incorporate the whole panoply of Federal constitutional laws but that the actions of tribal governments must be measured "in light of tribal practices" and that "essential fairness in the tribal context, not procedural punctiliousness, is the standard against which the disputed actions must be measured." [315] Variations from standard requirements of Federal law have been sanctioned in matters involving apportionment of election districts within a reservation and [316] in the determination of eligibility to vote in tribal elections.[317] Such flexibility in the application of this law is clearly necessary and desirable.

3. There is a growing body of law under the 1968 Act that requires exhaustion of tribal remedies before an action will be entertained in Federal court.[318] However, the decisions have not been consistent. The requirement of "exhaustion" parallels Federal requirements that before Federal courts will take jurisdiction over matters which should be determined in State forums, the plaintiff or complainant must show either that he has sought relief before the appropriate State agencies and/or courts or that it would be fruitless to attempt to obtain relief from those sources.

This rule is premised on the recognition that local governments should resolve problems of a local nature. Federal intervention should occur only when it is necessary to vindicate a federally protected right, and then only after a clear demonstration that the local government will not act.

It was not the intent of Congress when it enacted the 1968 Civil Rights Act to make Federal courts general overseers of tribal government. It is extremely important that the principle of exhaustion of tribal remedies be strictly adhered to by the Federal courts in every proceeding under this Act.

4. Tribes have always enjoyed sovereign immunity under the law.[319] It has been held in several cases that this immunity was waived by the 1968 Act. The most excessive application of this "waiver" doctrine is a holding by a U.S. district court authorizing a suit for monetary damages against a tribe [320] for the conduct of a tribal police officer in making an arrest.

Nothing in the legislative history of this Act even conceivably suggests that Congress intended to subject Indian tribes to suits for monetary damages. Every governmental entity in the United States reserves to itself the authority to determine the extent to which it subjects its public treasury to private claims. The United States Government has not authorized monetary claims against the Government for every violation by a Federal official of a right protected by the U.S. Bill of Rights.

Both the Department of the Interior and the Department of Justice have forcibly argued that the 1968 Act did not waive the general immunity of tribes from suit.[321] In concluding that tribal officials should be subject to the same judicial restraints as are State officials and no more. They were, of course, recognizing that extra-legal and abusive conduct by tribal officials would subject them to personal liability under the same legal theories that State officials are. The Commission believes that this is the correct approach.

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[315] *McCurdy v. Steele*, 353 F. Supp. 629, 630 (D. Utah, 1973), rev'd., F. 2d (10th cir., 1974).

[316] *Daly v. U.S.*, 483 F. 2d 700 (8th cir., 1973).

[317] *Wounded Head v. Oglala Sioux Tribe*, 507 F. 2d 1311 (8th cir., 1975).

[318] *See, e.g., O'Neal v. Cheyenne River*, 482 F. 2d 1140 (8th cir., 1973).

[319] *U.S. v. U.S. Fidelity and Guarantee Co.*, 309 U.S. 506 (1940).

[320] *Loncassion v. Leekity*, 334 F. Supp. 370 (D. N.M., 1971).

5. Section 202(7) of the Act (25 U.S.C. 1302(7)) provides that no tribe shall impose punishment upon any person greater than "imprisonment" for 6 months or a fine of $500, or both. Section 202(10) of the Act provides that "any person accused of an offense punishable by imprisonment" shall have the right to a trial by jury.

The limitations imposed upon tribal penal power are the same as that imposed upon Federal magistrates hearing petty offenses in U.S. district court. It is well established that there is no constitutional right to a trial by jury for petty offenses. Thus, this Act imposes upon tribes an obligation not imposed upon either State or Federal governments. No matter how short the potential jail sentence, a defendant before a tribal court is presumably entitled to a trial by jury.

Tribal courts presently handle a caseload in excess of 80,000 cases per year. It is well known that if jury trials were liberally sought, the tribal judicial system would quickly break down. Section 202(10) of the 1968 Act must be amended to restrict the cases in which jury trials may be demanded.

6. By the same token, the penal limits placed upon tribal courts are not considered to be realistic. Little consideration went into the establishment of these limits. Among other factors which apparently played a part in the development of this provision was the notion that tribal courts traditionally did not impose sentences in excess of 6 months or $500. The Senate bill proposing reform of title 18 U.S. Code (S. 1, 94th Cong., 1st sess.) would increase the fine potential to $5,000. Task Force Number Two recommended that section 202(7) be amended to provide for fines of $1,000 and jail sentences of 1 year.

7. A problem area not dealt with under the 1968 Act but one which poses great difficulty to both tribal and State governments is the extent to which the laws of tribes and the judgments of their courts will be recognized by State or Federal courts. There is a reciprocal question regarding the extent to which tribal courts must recognize the laws and judgments of States.

Two legal concepts provide a foundation for discussion: (1) full faith and credit, and (2) comity. An excellent discussion of the law on this subject is contained in appendix XIII of Task Force Number Two report. An early Supreme Court decision held that certain legal acts of the Cherokee Nation were entitled to full faith and credit on the theory that the government of that tribe base a relationship to the United States similar to that of a territorial government.[322] A similar position was adopted in other Federal decisions in the late 1800's.[323] In recent cases, a similar theory has been adopted by some courts[324] but rejected by others.[325] Regardless of theory, it is clear that some courts are giving due cognizance to orders of tribal courts[326] and some are not.

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[321] Task Force No. 4 Report, pp. 136-137; Task Force No. 9 Report, app. II, part V, ex. 16.

[322] *Mackey* v. *Coxe*, 59 U.S. (18 How.) 100 (1855).

[323] Task Force No. 2 report, p. 289.

The refusal of some States to recognize the laws of tribes and the orders of their courts is clearly harmful to both the tribes and the States. It should be noted that tribes generally are recognizing lawful orders of State courts when an appropriate request is made.[327] Clearly, the interest of orderly administration of the law requires that both tribes and States respect laws of each other.

Recommendations

The Commission recommends the following amendments to title II of the 1968 Civil Rights Act:

1. Congress enact provisions to make it crystal clear that this Act was not intended as a general waiver of sovereign immunity of the tribes. The holding in *Loncassion* v. *Leekity*, 334 F. Supp. 370 (D., N.M., 1971) authorizing a money judgment against the tribes should be specifically rejected by Congress. While the courts must have authority to enforce substantive aspects of the Act (as limited by the recommendation above), Indian tribes, like any other governments, must have sovereign immunity and some protection for their officers if they are to be able to govern fairly. Equitable actions such as mandamus against tribal officials may be permissible, but they should be immune from money judgments when they work within their scope of duty. In this respect they should be in the same position as State and Federal officials; i.e., protected when acting within the scope of duty but personally liable when acting beyond or outside their defined scope of duty.

2. The jurisdictional provisions of this Act be reexamined. Habeas corpus review is the only jurisdictional provision now included in this Act, yet the courts have assumed jurisdiction over a broad range of actions which do not involve detention. As the situation stands, the jurisdictional reach of Federal courts and the remedial orders which they feel free to enter is virtually unlimited. This is in complete contrast to all other Federal civil rights legislation.

3. The part of this Act providing for a right to trial by jury be amended to specify that the right guaranteed by this subsection shall only be applicable to offenses which if charged in a Federal court would be subject to a right to trial by jury. As section 202(10) presently reads the right to trial by jury would theoretically apply to almost every offense a person might be charged with, no matter how slight the penalty.

4. The provisions of the Act limiting the penal authority of a tribe to fines of $500 or 6 months imprisonment, or both, should be amended to increase these figures to fines of $1,000 or 1 year imprisonment, or both.

5. That section 1738 of title 28, U.S. Code, should be amended to specifically include Indian tribes among those governments to whom

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[324] *Jim v. CIT Financial Corp.*, 87 N.M. 362, 553 P.2d 751 (1975).
[325] *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624 (1950).
[326] Task Force No. 2 report, pp. 237, 249.
[327] *State v. Railey*, 87 N.M. 275, 532 P. 2d 204 (1975).

full faith and credit shall be given. The purpose of this amendment would be to clarify and reinforce the rulings of the majority of courts to the effect that Indian tribes are on the same footing as States and territories with respect to the application of full faith and credit principles.

6. Congress amend title II of the 1968 Civil Rights Act to provide a mechanism for limited appeals to United States district courts after exhaustion of all available tribal remedies. The need for such a provision is directly related to: (1) the Commission recommendation for according full faith and credit to tribal laws and court judgments; and (2) to the expanding role of tribes in civil and criminal matters involving non-Indians. This legislation should adhere to the following principles:

(*a*) Existing Federal law permits Federal courts to review the judgments of State courts for matters involving questions arising under the U.S. Constitution or Federal statutes. The limited right of appeal proposed in this part would authorize Federal court review of tribal court decisions in both civil and criminal matters in extraordinary circumstances involving a prima facie showing of a denial of due process (fundamental fairness) or denial of equal protection, and/or when the amount in controversy exceeds a specified amount. ($10,000).

(*b*) Section 203 of title II of the 1968 Civil Rights Act (25 U.S.C. 1303) which extends the privilege of the writ of habeas corpus to test the legality of detentions by order of Indian tribes be amended to provide a limited right of appeal from final orders or judgments of the highest court system of the respective tribe in both civil and criminal matters.

(*c*) Appeal to the Federal court not be allowed until the petitioner has exhausted all available tribal remedies. This "exhaustion" requirement include all tribal appellate remedies including appeals to regional intertribal courts of appeal should the tribes elect to enter into such intertribal compacts. The requirement for exhaustion should be rigidly enforced by the courts.

(*d*) The review not turn on procedural requirements but rather be premised on fundamental fairness based on the entire record. This amendment follow the rule laid down in cases that this Act did not "blanket in" the entire body of Federal case law but provides for interpretation in a manner consistent with the needs and customs of tribal institutions.

STATUS OF TRIBAL GOVERNMENTS AND THE DELIVERY OF SERVICES

A. FEDERAL DOMESTIC ASSISTANCE PROGRAM DELIVERY SYSTEM

Overview

In its first definitive statement on the question of Federal-Indian relations, in the landmark case of *Worcester* v. *Georgia*,[328] the United States Supreme Court articulated the most basic theory of Federal-Indian law—that Indian tribes are "distinct, independent political communities possessing and exercising powers of self-government derived solely from their original sovereignty." This enduring principle has never been overruled by congressional statute or Federal court decision, and indeed, Federal law and policy continues to recognize Indian tribes as independent self-governing political entities within the Federal system.

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[328] 31 U.S. (6 Pet.) 515 (1832).

The extent to which tribes can fully exercise their powers of self-government is largely dependent on congressional action which is consistent with Federal-Indian policy articulated in *Worcester*. However, analysis of the status of tribal governments within the Federal domestic assistance program delivery system leads to the conclusion that Congress and its numerous congressional committees established to deal in a comprehensive manner with the entire scope of the Federal responsibility have not always been conscious of the political status of tribal governments in creating authorizing legislation for Federal domestic assistance programs. Thus, consideration of tribal governments as constituencies eligible for Federal programs is often lacking in the planning stages of proposed Federal program legislation, and as a result, Federal programs intended for all United States citizens do not reach the total target population intended to be serviced under any particular act. The problem is further compounded by a lack of sufficient congressional guidance to executive agencies charged with the responsibility of service delivery. As a result, authorizing legislation, program acts, and associated administrative regulations of Federal domestic assistance programs may fail to specify tribal government eligibility to create delivery systems which force tribal governments to come under the jurisdiction of State and/or local governments. Not only do such requirements clearly thwart the ability of the tribal government to provide services to its tribal members, but these regulations often act to extend State or local government jurisdiction within the exterior boundaries of the reservation. Since an integral aspect of the Federal policy towards Indian tribes is the guarantee of independence from State jurisdiction and authority, it follows accordingly that tribal participation in Federal domestic assistance programs should not be conditioned on State involvement in the delivery of services.

Background

Tribal governments are recognized as eligible prime sponsors for a number of Federal domestic assistance programs. The extent to which tribal governments have taken advantage of the programs available to them has been largely dependent on the tribal government's access to Federal program information. This access is limited—most tribes depend solely on the receipt of the Catalog of Federal Domestic Assistance Programs, which details some 1,030 programs available to State, local, and tribal governments. Often, however, tribal government eligibility for any particular domestic assistance program is not specified, and the tribe has no means of ascertaining statutory barriers in the authorizing legislation or program act which would prevent tribal government eligibility for a given program. A bill introduced in the 94th Congress—the Federal Program Information Act (Senate bill S. 3281), if enacted would have created a data base of all Federal domestic assistance programs, and provided comprehensive coverage of authorizing legislation, program acts, and administrative regulations. This bill had the potential of increasing the flow of Federal program information to tribes, and if properly constructed, would specify tribal government eligibility as well as administrative requirements which might affect the prime sponsorship status of the tribal government. In order for tribes to make effective use of Federal domestic assistance programs in achieving self-determination, access to Federal program information is crucial.

Status of Tribal Government Within the Federal Domestic Assistance Program Delivery System

Problems surrounding State involvement in the delivery of Federal domestic assistance programs to tribal governments stem from a variety of sources. In some cases, authorizing legislation or program acts of an agency which is charged with service delivery will specify that all programs offered by that agency must be administered through a Federal-State delivery system. In other cases, program acts or administrative regulations of such acts require State passthrough or sign-off on tribal plans, or moneys to be directed to the tribal government. In such instances, even though a tribal government may be eligible to be the prime sponsor for a Federal program, the moneys to be received are channeled through the State by legislative mandate. Examples of such programs are the Food Stamp Program, Johnson-O'Malley education moneys, title XX of the Social Security Act, Coastal Zone Management Program, and some Law Enforcement Assistance Administration programs.

Still other programs, like those offered by the Small Business Administration, require a tribe to come under State jurisdiction, as eligibility is conditioned upon State incorporation of a business or organization, or the State must authorize that the enterprise is not an arm of the tribal government. Not only are such programs in direct conflict with established Federal policy which would prevent the extension of State jurisdiction within the exterior boundaries of the reservation, these programs authorize State discretion in the distribution of Federal moneys—an authority which has been abused in many instances. As stated by the Papago Tribe of Arizona, "by granting States authority to set standards of qualification, the States are given the power to usurp or interfere with the sovereign powers of Indian tribes to govern themselves * * *; by granting States final authority to set standards of qualification, the Federal Government is delegating to the States the power to disqualify Indian tribes from participation in Federal programs * * *; by granting States authority to set standards of qualification, the States are given implied power to force Indian tribes to the jurisdiction of State courts in order to meet such standards; and by granting the State authority to select the planning and funding agencies for Federal programs, the State is given the latitude to select as such agencies either political subdivisions of the State or contract providers organized by special interest groups, both of which represent constituencies inimical to or, in competition with Indian interests." [329]

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[329] Letter to Mel Tonasket, president, National Congress of American Indians from the Papago Tribe of Arizona, Nov. 3, 1975.

Countless examples have been cited by Indian people who have witnessed State abuses of authority granted to them in Federal domestic assistance program legislation. These illustrations show the State to be in clear violation of any role that Congress intended for the State in the delivery of Federal domestic assistance programs. The Indian community has consistently voiced strong support for the elimination of States from the delivery system of Federal domestic assistance programs to tribal governments. The most recent expressions of this support have been issued in major policy resolutions of the 1976 National Congress of American Indian Convention, and by a special committee reporting to the Board of Directors of the National Tribal Chairmen's Association. In addition, extensive documentation of tribal views concerning Federal domestic assistance programs can be found in the Tribal Government Task Force report to the American Indian Policy Review Commission.[330]

Analysis of all Indian input obtained to date, as well as consultation with government officials, leads to the conclusion that tribal governments must be considered equal to State governments for purposes of direct access to Federal domestic assistance programs. This is the only logical action consistent with established Federal policy which would prevent State jurisdiction over tribal governments, and eliminate State abuses of authority in the delivery of Federal domestic assistance programs to Indian tribes.[331]

Inequities of Population Formula Grant Guidelines

Other problems frequently cited by tribal governments in obtaining Federal domestic assistance stem from administrative requirements of Federal programs which condition eligibility in formula grants based on population. Because 82.9 percent of all Indian tribes have populations of less than 1,000 members,[332] many tribes are forced to form consortiums or intertribal affiliations because of a lack of a population base sufficient to qualify for Federal domestic assistance programs. Small tribes particularly fall victim to this stipulation and are forced to seek out other tribes with common areas of need and a willingness to cooperate. Given the geographical isolation of many small tribes and scarce financial resources which preclude travel, it is more often than not, a sheer impossibility for small tribes to identify other tribes in a similar situation and to make the communication necessary for such an alliance. More importantly, the principle of sovereignty recognizes the integrity of a sovereign government to form associations or alliances only upon the discretion of the sovereign, and not as a function of the administrative requirements of another governmental unit. Thus, eligibility requirements such as section 96.42

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[330] App. I, ch. IV, Tribal Government Task Force report to the American Indian Policy Review Commission, July 1976, 46–57.

[331] Recently administrative agencies have demonstrated an increasing awareness of the legal status of Indian tribes relative to eligibility for participation in their agency program. For example, the Chief Counsel of the U.S. Urban Mass Transportation Administration (UMTA), U.S. Department of Transportation rendered a legal opinion concluding that "Indian tribes and communities are eligible to participate in UMTA grant programs in the same manner as any local public body," citing *U.S. v. Mazurie* and *U.S. v. Kagama* (Dec. 2, 1976).

[332] BIA Tribes in Order by Population: 1973 Revenue Sharing: or Equivalent for Non-Revenue Sharing; or State Alternate for Oklahoma.

of the Comprehensive Employment and Training Act (CETA)[333] which requires that a tribe must represent at least 1,000 persons, immediately places 82.9 percent of Indian tribes under the condition of having to form consortiums or intertribal organizations to become eligible for CETA funding and is in clear violation of the principle of sovereign-chosen alliances.

Federal Agency Administrative Requirements

Generally, Indian tribal governments do not have the administrative mechanisms and manpower available to them, comparable to State and local governments. Thus, variations in funding cycles of each program operated, quarterly reporting requirements for each (many tribes prepare 100 reports annually)[334] lack of Federal program information, and poor to nonexistent BIA support, place a staggering administrative burden on tribes for which they are ill-equipped. Some measures have been taken to respond to this need, particularly section 104(a) moneys appropriated under the Indian Self-Determination and Educational Assistance Act, which provide financial support for tribal government capacity-building endeavors. Although major controversy surrounds the amounts available to each tribe (allocations based on population formulas derived from 1970 census data which is grossly inaccurate in many cases), tribal governments may now be in the position of obtaining the services of civil service personnel for much needed expertise and technical assistance under the Intergovernmental Personnel Act of 1970[335] by matching salaries with moneys available to the tribe under section 104(a).

Coordination Among Federal Agencies Responsible for Providing Federal Domestic Assistance Programs

Historically, tribal governments, like State and local governments, have been confronted with a complex maze of Federal programs, each of which requires a unique accounting and administrative system and separate personnel associated with each program unit. The result is that the tribal government must organize within itself a separate governmental component for each program administered. The Federal Government has continually sought to design a system to deliver Federal domestic assistance programs which would respond to the community needs of a tribal, local, or State government. The Office of Management and Budget's circular A-102 is an example of such attempts—a procedure which would act to reduce the number of different accounting systems required for each Federal program contracted.[336] Still, there remains a vast duplication of services and data gathering efforts conducted by each Federal agency, because of the severe lack of coordination existing among Federal agencies responsible for the delivery of Federal domestic assistance programs. A tribe is placed in the position of having to apply for as many as 10 to 15 different programs even to approach fulfilling the need for training and technical assistance. A delivery system and grants procedure which would allow coordination of Federal programs at the local level, can only be effective if the Federal agencies whose programs are involved can coordinate the provision of services to be delivered.

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[333] Public Law 93–201, sec. 96.42.

[334] App. XIX. Tribal Government Task Force report to the American Indian Policy Review Commission, July 1976; Tribal Government Surveys.

[335] Public Law 91–648, Jan. 5, 1971; 84 Stat. 1909, 42 U.S.C. 4701, 4702; 4711–13, 4721–28, 4741–4746, 4761–4772.

[336] Office of Management and Budget circular A–102.

Joint Funding Simplification Act

The recent issuance of the Joint Funding Simplification Act regulations (July 30, 1976)[337] has the potential of providing meaningful mechanisms to the achievement of Indian self-determination. This Act provides for a forum in which a tribal government can design a long-range development plan to be implemented through an integrated grants procedure. This Act was enacted by Congress on December 5, 1974:

> * * * to enable State and local governments and tribal governments and private, nonprofit organizations to use Federal assistance more effectively and efficiently, and to adapt that assistance more readily to their particular needs through the wider use of projects drawing upon resources available from more than one Federal agency, program, or appropriation.[338]

The process enabled by the Act involves negotiation between the tribal government, the Bureau of Indian Affairs, and Federal agencies for whose programs applications are being made. Agency representatives are empowered to waive administrative requirements which might prevent the tribal government from access to the Federal domestic assistance programs concerned. The negotiation process enables the tribal government representatives to interact directly with Federal agency representatives, and to secure the funding necessary from each agency to accomplish the goals outlined in the long-range tribal plan. Upon completion of the negotiation process, one integrated grant application is made, accompanied by each agency's commitment for funds and endorsement of the grant package. Finally, each Federal agency transfers the funds allocated in the grant package to one agency designated as the lead agency to administer the grant, and one letter of credit is issued to the tribe.

The flexibility of funds within the grant package allows grant recipients to spend funds in any order as long as allocations under each grant are spent appropriately at the end of the funding year. This procedure eliminates the problem of different funding cycles, as well as burdensome reporting requirements, as the tribe reports quarterly to the lead agency on only one grant program.

The Joint Funding Simplification Act enables tribes to have direct access to Federal agencies and to negotiate one integrated grant, thereby alleviating many of the problems now confronting tribal governments in their relationship to the Federal domestic assistance program delivery system.

In summary, the status of tribal governments within the Federal domestic assistance delivery system is subject to various legislative and administrative procedures which are inconsistent with established Federal policy. The implementation of principles which would resolve such inconsistencies should establish a clear definition of tribal government eligibility for each Federal domestic assistance program and guarantee the jurisdictional independence of tribal governments from State governments as permanent political entities within the Federal domestic assistance program delivery system.

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[337] Joint Funding Simplification Act (P.L. 93–510).

[338] Joint Funding Simplification Act (P.L. 93–510), purpose.

Recommendations

The Commission recommends that:

1. Congress enact legislation guaranteeing the permanency of tribal governments within the Federal domestic assistance program delivery system.
2. Congress enact legislation to resolve the inconsistencies of Federal domestic assistance legislative and administrative procedures as they define the status of tribal governments within the Federal domestic assistance program delivery system. The implementation of principles which would resolve such inconsistencies establish a clear definition of tribal government eligibility for each Federal domestic assistance program and guarantee the jurisdictional independence of tribal governments as permanent political entities with the Federal domestic assistance program delivery system.
3. Congress authorize the waiver of administrative regulations of Federal domestic assistance programs which condition eligibility on population formulas. Allocation of funds, however, should employ some population criteria such as that utilized by BIA under Public Law 93–638 to provide adequate funding to tribes with smaller population bases.
4. Congress establish Federal policy recognizing the sovereign right of a tribal government to form its own government. In accordance with Federal policy, eligibility criteria of Federal domestic assistance programs not force tribal governments to form consortiums or intertribal affiliations in order to become eligible for Federal domestic assistance.
5. Congress amend the Intergovernmental Cooperation Act of 1968 (40 U.S.C. § 535 and 42 U.S.C. § 1401) to include tribal governments in the scope of intergovernmental activities and access to Federal program information provided for under the Act.
6. Congress amend the Law Enforcement Assistance Act (42 U.S.C. § 3711, et seq.) to remove State jurisdiction over tribal governments in the service delivery system of Law Enforcement Assistance Administration programs, thereby allowing programs and moneys to flow directly to the tribal government.

B. FUNDING AND PUBLIC LAW 93–638

Overview

The degree to which a tribe can effectively exercise the powers which have been upheld by the Supreme Court as being inherent to it is largely dependent on two factors. The first is the ability of the tribe to finance the basic operations of tribal government. The second is the ability of the tribe to finance the cost of litigation with State or local governments or individuals who challenge the right of a tribe to exercise its powers. Both factors can serve as serious constraints upon the governing capacity of a tribal government.

Background—Ability of Tribes to Finance Operations

Commission interviews conducted over the past year revealed that very few tribes have the financial resources necessary to support the basic operations of tribal government.[339] Many tribal governments consist of a tribal chairman and a tribal council, which will vary in size from reservation to reservation. Where fully financed tribal governments exist, the position of a tribal administrator or business manager is one of considerable responsibility, as this person is usually responsible for overseeing the day-to-day functioning of the tribal government. The position of tribal attorney or legal counsel to a tribe is one that a majority of tribes interviewed expressed great need for.[340] However, relatively few tribes are able to generate revenues sufficient to salary these fundamental positions of tribal governments capable of exercising a full range of governmental powers. It is important to understand the relation of these concepts if the goal of self-determination is to be achieved.

Strengthening Tribal Governments: AIPRC Objective

In the authorizing legislation which created the American Indian Policy Review Commission,[341] the Commission was charged to "make a comprehensive investigation and study of Indian Affairs and the scope of such duty shall include, but shall not be limited to . . . a consideration of alternative methods to strengthen tribal governments so that the tribes might fully represent their members, and at the same time, guarantee the fundamental rights of individual Indians." [342] In compliance with congressionally established objectives, the Commission undertook the study of measures which would work to strengthen tribal governments, such that the stated goals might be achieved. It is to this end that the above needs of tribes as identified through surveys of tribal governments [343] are presented, so that Congress may know that without support to the basic operations of tribal governments, the goals outlined in section 2 of Public Law 93–580 cannot be realized.

Inability To Support Leadership Positions

In surveys, interviews, and testimony obtained from 121 tribes,[344] the large majority of tribal governments expressed a need for the ability to finance the positions of a full-time salaried tribal chairman, an adequately compensated tribal council, a tribal attorney, a tribal administrator, and needed technical assistance. These positions or functions were considered by most tribes to be the fundamentals of tribal government.

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[339] For extensive discussion of findings, *see* ch. III, Tribal Government Task Force report to the American Indian Policy Review Commission ; July, 1976.

[340] *See* ch. III, Tribal Government Task Force report to the American Indian Policy Review Commission ; July, 1976 ; p. 72.

[341] P.L. 93–580.

[342] P.L. 93–580, sec. 2.

[343] *See* app. XIX, Tribal Government Task Force report to the American Indian Policy Review Commission ; July, 1976 ; Tribal Government Surveys.

[344] *See* ch. II, Tribal Government Task Force report to the American Indian Policy Review Commission ; July, 1976 ; p. 67.

Commission analysis revealed that presently there is only one program which provides direct support to the strengthening of tribal goverment. This program is provided for in section 104(a) of the Indian Self-Determination and Education Assistance Act, and is titled the Self-Determination Grants Program.[345] Although the Self-Determination Grants Program is a clear indicator that Congress recognizes the need to provide support for the strengthening of tribal governments, Commission study has determined that the administrative regulations subsequently issued under the Act have narrowed the scope of congressional intent articulated in the Act, thereby thwarting the intent of Congress to provide direct support to tribal governments.[346]

Obstacles in Grant Regulations—Population Formulas

There are three major difficulties associated with the administrative regulations of section 104(a) of the Indian Self-Determination and Education Assistance Act.[347] The first problem stems from the fact that in determining the service population to be served by a tribal government, population formulas are used. Assuming that a tribal government might decide to use its section 104 moneys to revise their tribal constitution for instance, it is difficult to see how the finances needed for a tribal constitution revision would be any greater for a tribe with 100,000 members versus a tribe with 100 members. Commission field work further reveals that many small tribes experience difficulty in preventing the diminution of tribal trust land, or exercising their jurisdiction within the exterior boundaries of their reservation. Thus, the need for legal counsel is often greater for a small tribe than it might be for a large tribe which can adequately generate enough tribal revenue to support representation by several law firms. Yet, it is the larger tribes which benefit from population-based funding and the small tribes which continue to suffer from underdevelopment of tribal government governing capacities. Because of the "allowable costs" for tribal government capacity building in the Act are of this nature, population formula-based funding does not reach those with the greatest need.

The problem is further compounded by the fact that the population formulas used for the administration of section 104, are bound by circular A–46 revised, exhibit 1, from the Office of Management and Budget.[438]

This circular requires that all population formulas be based on 1970 census data population estimates. Indian people have vociferously objected to the population estimates projected from the 1970 census as being grossly inaccurate. The problem is only magnified in 1977.

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[345] P.L. 93–638, sec. 104(a).

[346] P.L. 93–638, sec. 104(a).

[347] For extensive discussion of findings, *see* ch. III, Tribal Government Task Force report to the American Indian Policy Review Commission, July, 1976.

[348] Office of Management and Budget circular A–46 rev., ex. 1, June 6, 1975.

Criteria for Determining Service Populations

The second problem with the administrative regulations of the Indian Self-Determination and Education Assistance Act section 104(a) is the criteria for determination of the eligible service population to be served by tribal members living on trust property. The rationale given for establishing this criteria is that tribal members who are not living on trust property will be serviced by some other unit of government. This is clearly an erroneous assumption on the part of the Office of Management and Budget. Many Indians reside off the reservation but retain their traditional ties. Within the shortage of adequate housing and the high rate of unemployment existing on most reservations, Indians must seek housing and employment opportunities elsewhere. This fact, however, does not relieve the tribal government of the responsibility to provide services to those tribal members residing off the reservation, and indeed, many tribal members return to the reservation on a frequent basis to avail themselves of those services, particularly health care.

Many Indian people forced to relocate to large urban centers complain that they do not receive services equal to their non-Indian counterparts, that they are continually discriminated against. Thus, it is not unusual for an Indian family residing in an urban center to travel hundreds of miles back to the reservation to provide their children with adequate health care which they are not able to obtain in the city. The capacity of the tribal government to provide tribal members with these services is severely limited by these administrative regulations which penalize the tribal government for its off-reservation service population, but do not relieve the tribal government of the responsibility for providing services to those tribal members residing off the reservation.[349]

Definitions of Allowable Costs for Grants

Finally, the administrative regulations associated with the Self-Determination Grants Program specify "allowable costs" under the program which serve to limit the allowable activities undertaken to strengthen the tribal government. Many of the restrictions are contradictory and establish a hierarchy of priorities and "acceptable" governmental activities which do not provide meaningful assistance to the capacity-building efforts of many tribal governments.[350] Moreover, recent Office of Management and Budget reports to Congress on fiscal year 1978 appropriations restrict even further the purposes for which section 104(a) moneys can be expended.

Litigation Costs as a Burden on Tribal Governments

The second major factor which acts to constrain the governing capacity of a tribal government is the burden of litigation many tribes face in protecting tribal trust land resources, as well as the tribe's exercise of its sovereign powers. Because of the conflict of interest discussed in section I of this chapter, the Departments of Interior and Justice frequently choose not to represent tribes in litigation with other Bureaus within the Department of Interior or in conflicts with State governments. The resultant financial burden rests solely with the tribe, the party to litigation which can usually least afford to bear the costs of reestablishing the sovereign powers which have been recognized and upheld so consistently by the Supreme Court.

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[349] For further discussion, *see* ch. III, Tribal Government Task Force report to the American Indian Policy Review Commission; July, 1976; p. 81.

[350] For detailed analysis, *see* ch. III, Tribal Government Task Force report to the American Indian Policy Review Commission; July, 1976; p. 78.

Powers of a sovereign become meaningless unless they can be exercised, and yet, some tribes have been forced to delay asserting their sovereign powers purely because they lack the income necessary to support litigation which might ensue over the exercise of inherent tribal powers of government.[351] It is logical to assume that when the Supreme Court upholds the power of a tribe to tax,[352] subsequent suits challenging the power of a tribe to tax should shift the financial burden for litigation to the party challenging the tribe's right to tax.

Summary

The goal of self-determination would restore to tribal governments the status which they are legally accorded by the Supreme Court. In order for tribal governments effectively to assert their legal status within the Federal system, tribal governments must have the financial resources necessary to support the basic operations of tribal government, so that they may fully exercise their right to tribal self-government and achieve the goal of self-determination.

Recommendations

The Commission recommends that:

Congressional recognition of the legal status of tribal governments include the recognition that tribal governments must have the financial resources necessary to support the basic operations of tribal government, so that tribes may effectively exercise their inherent sovereign powers.

Congress direct the Bureau of Indian Affairs to undertake a needs assessment of each tribal government to determine tribal capability to finance the basic operations of tribal government.

Congress authorize the evaluation of the administrative regulations of self-determination grants program, and require the revision of regulations where such regulations narrow the scope of congressional intent articulated in the Indian Self-Determination and Education Assistance Act.

Congress assure that in both administrative and judicial proceedings, Indians will be assured competent, independent counsel.

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[351] Tribal Government Task Force report on Uintah-Ouray Reservation, p. 2.

[352] *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th cir. 1956); ***Buster v. Wright*****, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).**

CHAPTER SIX

FEDERAL ADMINISTRATION OF INDIAN POLICY

TOO MUCH BUREAUCRACY

Present budgetary practices do not provide an equitable share of Federal appropriations for Indian services for the direct benefit of Indians. Instead, the ratio of one Federal administrator for every 19 Indians illustrates that the Government's massive administrative organization absorbs an inordinately large proportion of Indian appropriations to support Federal employees. Rather than benefiting the tribes directly, relatively high Federal salaries result in expenditures constituting transfer payments to civil servants.

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CHAPTER VI

FEDERAL ADMINISTRATION OF INDIAN POLICY

INTRODUCTION

The Indian desire for a functional "self-determination" policy including provisions for its administrative implementation is documented by testimony of tribes and countless individuals and through the examination of more than a hundred previous studies. The net effect of this pattern of ineffectiveness represents a 200-year record of erratic policy, fluctuating from periods of benevolence to periods of attempts to totally eliminate tribes, and back to renewed policies of support and protection.

The first chapter, "Captives in a Free Society," as well as the chapters on "history", "trust", and "tribal government", provide the background for the following discussion and an evaluation of the administration of Indian trust and its related program functions.

Almost every aspect of Indian life falls under the stewardship of Federal administration. Indian administration affects the trust relationship, tribal government, jurisdiction, social services, and, generally, the present economic and social condition of Indians. The frustrations found in the administration of all these elements, are rooted in the history of Indian affairs. These factors, though intended to be managed in order to advance the Indian cause of self-expression, actually have become lost in a maze of organization, Federal regulation, and procedure which often turns Indian administration into a mechanism for economic stagnation, rather than progress.

In spite of a general expectation for the eventual disappearance of Indians through assimilation, the life style, governmental capacities, and aspirations of Indian tribes are expanding. Indian life expectancy is increasing and the Indian population is growing. Indian tribes, more cognizant of their powers and their roles as governments, are now insistent that Indian self-determination become a reality, instead of languishing as a frustrating concept.

Tribal self-government cannot be framed in law alone; nor can it be legislated and administered except by the will of the people. If tribes begin to exercise their powers of government, they can be expected to conduct their affairs in a rational, intelligent, and lawful manner. It is unreasonable, and frustrating to Indians, for anybody to assume otherwise.

The frustration of the rights of tribes to exercise powers of government by the administrative edicts and procedural dictates of delegates of the Secretary of the Interior should no longer be acceptable to Congress or the Indian tribes. A more appropriate vehicle for self-govern-

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ment can be achieved by delegating the powers of the Secretary to tribal governments rather than to civil servants. It is then reasonable to assume that tribes will be accountable once given the guidelines in the form of published rules and regulations.

GOVERNMENT BY EXPERTS

The principal rationalization for the domination of Indian tribes is the presumption that tribes "are not ready," or that the trust relationship constitutes a license to conduct Indian governmental functions by experts. Expert rulers, however, have been traditionally mistrusted by many societies. In any event, tribal self-government cannot be framed in law alone. As Indians begin to practice self-government, there should be a confidence in their ability to manage their own affairs.

> Government is a matter chiefly of human purpose and of justice, which depends upon human purpose. And each of us is a more faithful champion of his own purpose than any expert. The basic principle of American liberty is distrust of expert rulers, and recognition in Action's words, that "power corrupts and that absolute power corrupts absolutely." That is why America, despite all the lingo of the administrative experts, has insisted upon self-government rather than 'good government', and has insisted that experts should be servants not masters. And what we insist upon in the governing of these United States, our Indian fellow-citizens also like to enjoy in their limited domains: The right to use experts when their advice is wanted and the right to reject their advice when it conflicts with the purposes on which we are all our own experts.[1]

TOO MUCH BUREAUCRACY

Present budgetary practices do not provide an equitable share of Federal appropriations for Indian services for the direct benefit of Indians. Instead, the ratio of one Federal administrator for every 19 Indians illustrates that the Government's massive administrative organizations absorb an inordinately large proportion of Indian appropriations to support Federal employees.[2] Rather than benefiting the tribes directly, relatively high Federal salaries result in expenditures constituting transfer payments to civil servants. The functions of public works, social services, real estate, law enforcement, government services, as well as education, medical, and private business are administered by a surrogate local government headed by Federal employees. The massive structure is maintained by congressional appropriations which could better serve the Indian tribes directly. The $10 million increase in the BIA budget in fiscal year 1977, which falls below the normal 6-percent annual inflationary allowance, was absorbed by pay raises for Bureau personnel.[3] The transfer of funds should be directly to Indian tribes and the outmoded, paternalistic structure of the BIA should be modified to reflect the changing priorities of the Indian people.

Instances abound of the subversion of the rights of tribes at the convenience of the Government. And the discretionary powers of the executive branch consistently are used to overrule tribal actions. The administrative prerogative of failing to act often constitutes a pocket veto of many tribal actions. It is frustrating to the Indian people to be singled out as being unable to administer governmental functions in a rational, intelligent, and lawful manner when the contrary is, as a matter of course, presumed for the other governments.

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[1] Felix Cohen, The Legal Conscience.
[2] AIPRC Task Force No. 3, BIA Management Study.
[3] *See* chart on p. 255.

Nor is the BIA alone in taking unfair advantage of Indian people. Other agencies have compounded the problem by becoming equally paternalistic, complicating the problems further with ineffective coordination while manifesting a disinclination to cooperate with other agencies serving Indians.

NEGATIVE FACTORS INHIBIT CHANGE

Two negative factors have consistently been deterrents to desirable change in the consideration of improving administration of Indian affairs:

> The fear of Indian people that any new legislation or administrative change might threaten the existence of tribalism and the Indian peoples' special relationship with the United States.
>
> The propensity of the Indian bureaucracy to resist change while maintaining and even expanding its size and span of control over Indian tribes and their members.

Throughout history, Indian tribes have found it necessary to repel injudicious Federal legislation and policy rather than to permit administrative manipulations which would abuse their rights. They instinctively distrust all change initially because of the harm that sometimes well-meaning but ill-conceived policy changes have caused in the past. Consequently, in order to establish positive Indian administration, it should be recognized that the best solution to the floundering state of Indian affairs is one which seeks to achieve a permanent settlement of longstanding issues and is developed in concert with Indians.

There has been an extensive use in the last decade of the practice of agencies "consulting" with Indians before decisions are made. This generally means that tribes, organizations, and individuals are given an opportunity to respond before final actions are taken. The term "consultation" has been so frequently used that it has escaped notice that it represents a contradiction to "self-determination," and has been misused by bureaucrats for so long that its true meaning is lost.

Out of government "consultation" has grown the phenomenon of "appointed advisory boards." These boards have grown in subject and number to the point that they add to the competition with Indians for Federal funds. In the consideration of any substantive change in the delivery of services to Indians, suffice it to say, elected Indian boards that make decisions are a much better alternative.

Tribal government functions best as an expression of the will of its people. This is particularly obvious when tribal institutions are permitted to function and protect their members against experimentation and frustration by public officials. An atmosphere of mistrust and anxiety, fostered by previous experience, does not serve either Indians or the Federal Government.

FUNDAMENTAL PRINCIPLES NEEDED

The organizational structure, and philosophy for the delivery system of Indian programs must be revised to provide for efficient management of Indian affairs. Because of the unique trust relationship between the United States and Indian tribes and the incredible complexity of the present system there is a necessity for the creation of a separate governmental structure for all major Indian programs.

As reflected in previous chapters, an understanding of the permanency of tribal government, the nature of the Federal-Indian trust relationship described therein, and a cooperative understanding of the relationship of each to the other is essential before any Federal administrative organization can be effectively designed to achieve agreed-upon goals. Public Law 93–580, which established this Commission, cites a congressional finding "(a) the policy implementing the relationship has shifted and changed with changing administrations and passing years without apparent rational design and *without a consistent goal to achieve Indian self-sufficiency.*" [Emphasis added.]

The establishment of institutional measures to achieve Indian control without impairing their special status cannot be resolved without addressing Indian-felt needs, and then devising a functional system which will provide a way to satisfy those needs. The AIPRC attempted to establish a record of Indian need through testimony and special submission from tribes directly. Some sense of Indian desires has been gained, but the only way to actually determine Indian priorities is to establish a program/planning/budget system which permits these priorities to be manifested. The application of a "zero base" budget process would be very helpful in such a system.

The executive branch has the responsibility to not only account for, but also to evaluate Indian programs. The present system is an accumulation of Federal programs which has never effectively been reevaluated or assessed for effectiveness or efficiency. The program parameters are too restrictive. There is excessive overlap and uncoordinated efforts causing duplication by several agencies. The present system prevents Indian tribes from effectively controlling the processes which determine their status present and future. A planning assessment by the General Accounting Office in 1975 reported:

> We believe that coordination of Federal efforts at the reservation level is needed for all Indian tribes and that evaluations of the type covered in this report should be made for all tribes.
>
> We therefore recommend that the Office of Management and Budget take the necessary action to insure that:
>
> an approach is developed which will coordinate Federal efforts at the reservation level.[3a]
>
> continuous evaluations are conducted of the effect that Federal programs have on the standard of living at Indian reservations including developing information systems to support such evaluations, and
>
> annual reports are submitted to the Congress on programs made in improving the standard of living of reservation Indians and on any needed changes in legislation to improve the effectiveness of Federal programs.

[3a] A previous GAO report, "Improving Federally Assisted Business Development on Indian Reservations" (RED–75–371, June 27, 1975), made a similar recommendation with respect to business development programs. The above recommendations expand the earlier one to apply to all Federal programs.

If early action is not taken, we recommend that the Congress enact appropriate legislation.[4]

The summary of findings of the American Indian Policy Review Commission will indicate that Government programs are too complex and lack coordination. This chapter will discuss fundamental approaches to the problems which heretofore have been beyond the perception of Federal administrators.

Any detailed plan will have to be developed by the executive branch working in concert with Indian people. The sum total of written testimony, hearings, and an examination of the record reveals that there were certain common elements in Indian statements. In addition statements were examined by the Commission from Indian position statements and resolutions from the past.[5]

An analysis of the entire record shows that there are certain precepts contained in all the Indian statements. The discussion of the problems of Federal Indian administration should begin by describing the necessary fundamentals of a contemporary and effective Indian administration:

> Develop a program delivery system committed to the delivery of services, grants, and contracts directly to tribes and native communities. The first priority should be on trust protection and services as well as for programs dedicated to the promotion of economic self-sufficiency. These programs should be characterized by:
>
> Priority provisions for adequate trust protection and services
> Broad program parameters with maximum latitude
> Direct grants and contracts
> Separation of direct program and Federal agency administration support costs
> Minimal Federal administrative cost
>
> Develop an Indian budget system from a "zero base," consistent with long-range development plans based on tribal needs and priorities. This system should be designed to provide that those needs effectively constitute a submission, to the executive branch and the Congress, of a national Indian budget request. Such a process, although recognizing congressional limitations, would provide an adequate system for determining tribal priorities. The process should have minimum interference prior to submission to Congress—tribes retaining the right to appeal, as per existing statutory provisions.[6]
>
> Develop a system for the Federal coordination of special Indian and domestic assistance programs to be established at the tribal or community level—such coordination to be performed by one agency at the direction of the tribal officials. This system should be implemented at the direction of the executive branch and should be periodically monitored to assure interagency compliance.

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[4] Comptroller General of the United States, General Accounting Office, Report to the Congress, "Better Overall Planning Needed to Improve the Standard of Living of White Mountain Apaches of Arizona," p. 77.

[5] National Congress of American Indians, report prepared for the American Indian Policy Review Commission, June 1975, "An Examination of Historical Indian Policies and Priorities, 1900–75."

[6] 25 U.S.C. sec. 476.

Develop a system by which the executive branch establishes provisions for the monitoring, evaluation and audit of programs so that they can be utilized more efficiently. Such a system should also have provisions for a published accounting, separating administration and program, and reporting to Congress, the Indian people, and to the appropriate levels of the executive branch. This should be done on an annual basis.

Develop a system of technical assistance which provides support directly to tribes, primarily through grants, which would enable them to hire from the open market. In the case of Federal employees in the Indian service, future recruitment should be limited to highly qualified and experienced technicians rather than general administrators.

A resolution of the fundamental issues left to be resolved by the Indian people and the Federal Government requires an evaluation of needs compared to how the efforts to address these needs are administered. An appropriate and effective working relationship can be achieved if tribal control can be fostered. Countless Indian statements over the past 77 years have given us the recipe for success.

History of Federal Administration of Indian Programs

INTRODUCTION

Today, most Americans think that there is one agency, the Bureau of Indian Affairs, which administers programs directed to Indian people. Although there are a number of agencies which now serve Indian people, the public perception is partially correct. The Bureau of Indian Affairs administers the majority of the Federal Government's Indian programs, and throughout history, it has held almost singular control in this area. Since one agency has borne the major responsibility for implementing Indian policy, the orientation, structure, and organizational flexibility of that agency has been of primary importance when new policy guidelines have been determined in Indian affairs. The history of Federal administration represents a struggle that has gone on in bureaucratic offices largely without the public's attention, and long after congressional debates. This often-ignored history shows that obstacles to Federal Indian policy are not always legal, or theoretical, or political, but quite often, administrative.

BEFORE THE ESTABLISHMENT OF THE BUREAU OF INDIAN AFFAIRS 1775–1832

The need for formal and legitimate procedures to carry out the Federal Government's policy toward Indians has existed as long as the Federal Government itself has existed; that is, from the time the Federal Government was organized on a continent which was populated mostly by Indian people. As early as 1775, representatives of the American colonies in the Continental Congress created three departments of Indian affairs and appointed commissioners to make and maintain treaties of peace and friendship with the Indians.[7] These officers were to represent the colonies' interest in their dealings with Indians, but were not to interfere with the internal affairs of Indian nations. Such interference would have had disastrous consequences for the colonists. As a result this small bureaucratic development occurred without any suggestion that the American government might ever try to assert its will in Indian communities. This fact was noted by the first scholar who studied the Indian policy of the Continental Congress, at a time when Indian nations were not so powerful as they had been in 1775. He observed that at the time Indian policy was first envisioned, "it was not contemplated * * * that Congress should have any legislative power over the Indians."[8] It was clear in these early stages, however, that the national Congress had the exclusive governmental authority to regulate trade and make treaties with Indian tribes.

After the Declaration of Independence, the Continental Congress found it difficult to administer Indian policy and wage the American Revolution at the same time. Since the military aid of Indian nations, particularly in New York State, was crucial to the war effort, Indian affairs was given top priority, but the administration of Indian affairs was largely turned over to the Board of War. When Congress directed the Commissioners for the Northern Department on May 17, 1779 to consult with General Washington on treaty matters and to follow his direction,[9] it established the precedent of delegating its authority over Indian affairs.

In 1776, Congress institutionalized this precedent by establishing two Indian departments, one in the North and one in the South, both of which reported to the Secretary of War. The two superintendents of these departments were given the authority to issue licenses to citizens who desired to trade with or live among Indians. An administrative system was thus established for a peacetime relationship with Indian people, at a time when Indian relations were relatively stable and no dramatic new policies were being considered.

Even greater delegation of congressional authority accompanied the drafting of the Constitution. When Congress created the War Department as a permanent fixture in the executive branch, it gave the Department wide responsibility for matters "relative to Indian Affairs".[10] The War Department continued to administer Indian policies for 60 years. Subsequent legislation continued to give the Department considerable latitude in administration. By 1832, when the Bureau of Indian Affairs was created, the Commissioner of Indian Affairs was described as having "the direction and management of all Indian affairs and of all matters arising out of Indian relations", under the general authority, of course, of the Secretary of War. That Congress had delegated its power and established a firm base of authority for executive action in Indian affairs was clear within the first 50 years of Federal-Indian relations.

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[7] Journal of the Continental Congress, vol. 2, p. 175.
[8] Joseph Blunt, Historical Sketch—The Jurisdiction Over Indian Tribes, p. 93.
[9] Journal of the Continental Congress, vol. 14, p. 600.
[10] First Congress, Session, ch. VII (1 Stat. L. 49), sec. 1.

CREATION OF THE BUREAU OF INDIAN AFFAIRS [11]

The Bureau of Indian Affairs was established within the War Department on March 11, 1824, by order of Secretary of War John C. Calhoun. From 1789 until 1824 the administration of Indian affairs, except for the Government-operated factory system of trade with the Indians, was under the direct supervision of the Secretary of War. The factory system—from 1806 until it was abolished in 1822—was administered by a Superintendent of Indian Trade responsible to the Secretary of War. The Superintendent's powers and responsibilities had expanded over the years as the Secretary delegated increasing authority to him. Thomas L. McKenney, the last Superintendent of Indian Trade, became the first head of the Bureau of Indian Affairs.

The Bureau was operated informally within the War Department from 1824 until 1832, when an act of Congress [12] authorized the appointment of a Commissioner of Indian Affiairs, who under the direction of the Secretary of War, was to direct and manage all matters arising from relations with the Indians. In 1849, by an act of Congress.[13] the Bureau was transferred from the War Department to the new Department of the Interior. where it has since remained. Although Secretary Calhoun used the term "Bureau" in his order, the name "Office of Indian Affairs" soon came into common usage. The name "Bureau of Indian Affiairs" was not formally adopted until 1947.

THE STRUCTURE OF THE ADMINISTRATION OF INDIAN AFFAIRS 1786–1940

For many years the only positions, in the Washington office of the Bureau that were specifically authorized by statute were those of Commissioner of Indian Affairs and Chief Clerk. Until 1886 the Chief Clerk was the second ranking official in the Bureau, and he acted for the Commissioner in his absence. In 1886, Congress established the position of Assistant Commissioner to replace that of the Chief Clerk. The position of Chief Clerk was reestablished in 1906 and that of Assistant Commissioner was retained. From 1910 to 1915, the Chief Clerk was designated as the Second Assistant Commissioner. The position of Chief Clerk was abolished in 1934. Since World War II there have been created the additional positions of Deputy Commissioner and Associate Commissioner, ranking above Assistant Commissioners.

There were no formal subdivisions of the central office of the Bureau until 1846, when four divisions were established by order of the Secretary of War. The names of these divisions varied; but they were most commonly known as Land Division. Civilization Division, Finance Division, and Files and Records Division.

During the 19th century there were two principal types of field jurisdictions: superintendencies and agencies. Superintendents had general responsibility for Indian affairs in a geographical area, usually a territory but sometimes a larger area. Their duties included the supervision of relations among the various Indian tribes in their jurisdiction and between the tribes and citizens of the United States or other persons, and the supervision of the conduct and accounts of agents responsible to them. Agents were immediately responsible for the affairs of one or more tribes. Until the 1870's most agents were responsible to a superintendent, but some of them reported directly to the Bureau of Indian Affairs. Agents attempted to preserve or restore peace and often tried to induce Indians to cede their lands and to move to areas less threatened by white encroachment. They also distributed money and goods as required by treaties and carried out other provisions of treaties with the Indians. Gradually, as the Indians were confined on reservations, the agents became more concerned with educating and civilizing them.

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[11] The material for this section, and large segments of subsequent sections of this administrative history, are reprinted from Edward E. Hill. Preliminary Inventory Number 163, Records of the Bureau of Indian Affairs, the National Archives, Washington 1965. The Commission wishes to express its gratitude for Mr. Hill's contribution to this seldom-studied area of Indian Affairs.

[12] 4 Stat. 564.

[13] 9 Stat. 395.

The superintendency system is usually considered to have started with an "Ordinance for the Regulation of Indian Affairs", enacted by the Continental Congress on August 7, 1786. This ordinance established a northern Indian department and a southern Indian department, which were divided by the Ohio River. A Superintendent of Indian Affairs was authorized for each of these departments. These positions were continued when the new Government was organized under the Constitution. In 1789, Congress appropriated the necessary funds for the Governor of a territory to serve ex officio as Superintendent of Indian Affairs, particularly in newly organized territories. The superintendencies located in an unorganized territory or in the States or where the duties of the superintendent were particularly arduous, a full-time superintendent was appointed.

Agencies were established at first in a somewhat casual manner. In 1792 the President appointed four special agents, who were charged with special diplomatic missions. In 1793, an act of Congress[14] authorized the President to appoint temporary agents to reside among the Indians. Eventually, the word "temporary" was dropped from their title, and agents became permanent Indian agents assigned to particular tribes or areas. By 1818 there were 15 agents and 10 assistants or subagents. That year Congress passed a law[15] providing that all agents be appointed by the President with the advice and consent of the Senate.

By the time the Bureau of Indian Affairs was established in 1824 the system of superintendencies and agencies was well organized. An act of June 30, 1834,[16] specifically authorized certain superintendencies and agencies. The President could discontinue or transfer agencies but was given no authority to establish additional ones. An act of February 27, 1851,[17] fixed the number of superintendencies and agencies, taking into account the greatly expanded area of country after the Mexican-American War and the settlement of the Oregon boundary dispute with Great Britain.

The restrictions on the number of agencies were, in a sense, evaded by the establishment of subagencies, which did not require congressional approval. After 1834 most subagents became in effect regular agents, although they received less salary and were usually assigned to less important agencies. Additional agencies were also established by creating "special agencies". A special agent was often appointed to carry out some special assignment, but frequently special agents were simply regular agents appointed in addition to the authorized agents. Superintendents, particularly those in newly organized areas, often appointed special agents and acting agents of various kinds—sometimes without authority to do so.

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[14] 1 Stat. 331.
[15] 3 Stat. 428.
[16] 4 Stat. 735.
[17] 9 Stat. 574.

The Bureau employed other kinds of agents. Purchasing and disbursing agents were concerned, respectively, with obtaining goods and with distributing either goods or money. Emigration agents assisted in the removal of the Indians from one area to another. Enrolling agents were appointed to prepare rolls for annuity disbursements, land allotments, or other purposes. There were also treaty commissioners, inspectors (beginning in 1873), and special agents assigned to some specific mission such as the investigation of the conduct of a regular field employee or the settlement of claims.

Superintendents and agents in newly established jurisdictions were allowed a wide latitude of action. The assignment of agents was often left to the discretion of the superintendent. Agents were permitted to select sites for agency headquarters, subject to approval by superiors. Some agents had no permanent headquarters and spent much of their time traveling. Gradually, as the Indians were settled on reserves, the agencies became more fixed in location; better communications were established; and the superintendents and the agents were replaced by Army officers, but in the following year most of these officers in turn were relieved of their duties and civilians were again appointed. It was a common practice, however, to detail Army men to duty with the Indian Service in periods of unusual disturbances or when civilian agents were unavailable. During the 1870's the Bureau allowed various religious denominations to recommend certain persons to be agents.

The system of giving supervision over a number of agencies to a superintendent was discontinued during the 1870's, and by 1878 the last superintendency had been abolished. Thereafter all agents reported directly to the Bureau of Indian Affairs. Inspectors and special agents, however, were sometimes given some supervisory authority over agents.

In 1893, an act of Congress [18] authorized the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, to assign the duties of Indian agent to a school superintendent. This action was needed to eliminate political patronage (school superintendents were under civil service regulations, but Indian agents were still appointed politically); moreover, the Indians, under the allotment system, were being divided into smaller, more scattered groups. All agents were gradually replaced by superintendents, who were not necessarily in charge of any school. The Bureau revived the term "agency" for field units, but the officers in charge continued to be called "superintendents".

In 1879 the first nonreservation Indian boarding school was established at Carlisle, Pa., and other schools were established elsewhere.

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[18] 27 Stat. 614.

The position of Superintendent of Indian Schools was established in 1883. For some years the Superintendent performed duties similar to those of an inspector, and he had little administrative authority. In time, however, he directed the Indian school system; and, in 1910, his title was changed to Chief Supervisor of Education.

Other supervisory positions were established for specialized activities such as irrigation, forestry, Indian employment, law enforcement, health, and construction. The incumbents of these positions were regarded as field officials, even though some of them maintained their headquarters in Washington. They developed their own elaborate organizations, which in some cases included district systems. Since these services operated outside the regular agency system and apart from the administrative divisions in Washington, problems of conflicting authority arose.

In 1925 the position of General Superintendent was created. The former Chief Supervisor of Education was appointed to the new position and he was placed in charge of field activities relating to education, agriculture, and industry.

In 1931 there was an even more sweeping change. Directors were appointed for specialized activities such as education, health, irrigation, and forestry. These directors were in charge of both field operations and those of the Washington office. The Director of Irrigation, for example, was in general charge of both the Irrigation Service in the field and the Irrigation Division in Washington. By 1937 the Bureau had established uniform districts for the various field services in order to eliminate the confusion that resulted from each service's setting up its own district system. After World War II a system of area offices was established whereby area directors were responsible for administering all Indian activities within their areas, including the supervision of agencies and other administrative units. Specialists were expected to provide technical supervision but were relieved of executive responsibility.

REORGANIZATIONS OF THE BUREAU OF INDIAN AFFAIRS 1830–1972

There were relatively few changes in the organization of the Bureau until 1907. The most important one was the 1849 transfer of the Bureau from the War Department to the Department of Interior where it remains to the present day. This move was taken in order to change the administration of Indian affairs from military to civilian control, and did not affect the internal structure of the Department. All of the powers which Congress had delegated to the Secretary of War, relating to Indian Affairs, were summarily transferred to the Secretary of the Interior. Actual administration was also minimally affected by the transfer; military officers continued to be employed as Indian agents. Furthermore, the transfer was less than secure; because of conflict between tribes and frontier settlements, Congress continually debated transferring the Indian bureau back to the War Department.

From 1873 to 1881 there was a Medical and Educational Division, which assumed some of the duties of the Civilization Division. The Accounts Division was established in 1876; most of its functions had formerly been assigned to the Finance Division. In 1884 the Civilization Division became the Education Division. In 1885 the Depredation Division was established to process depredation claims; but, in 1893, it was consolidated with the Land Division. A Miscellaneous Division was established in 1889 to take over certain duties formerly assigned to the Office of the Assistant Commissioner, particularly the issuance of traders' licenses.

Between 1907 and 1915 the Bureau's central office was repeatedly reorganized. The Land and Education Divisions survived; and the Education Division, in particular, was given expanded duties. The Finance Division was replaced by the Purchase Division. In 1909 the Purchase Division was consolidated with the Education Division, but in 1914 it was reestablished as a separate division. The name of the Accounts Division was changed to Finance Division. The Miscellaneous Division was abolished. The Files and Records Division was replaced by the Mail and Files Section, which became a part of the Office of the Chief Clerk. The office of the Law Clerk, separated from the Land Division, developed into the Law Division (later known as the Probate Division). An inspection service was organized and it became eventually the Inspection Division. A short-lived Division of Field Work (or Cooperation Division of Field Work, or Cooperation Division) was responsible for irrigation and forestry activities formerly assigned to the Land Division. The Division of Field Work was abolished about the end of 1908, however; and responsibilities for irrigation and forestry projects were shunted about until 1912. Thereafter there were separate Forestry and Irrigation Sections, which seem to have been associated with the field service rather than the central office. A short-lived Indian Territory Division, in charge of the affairs of the Five Civilized Tribes, was consolidated with the Land Division. For several years there was also a Methods Division, which was responsible for developing office procedures and organization.

Another aspect of the reorganizations during the 1907–15 period was the subdivision of the divisions into sections.

There were no major changes in the organization of the central office from 1915 through 1923. In 1924 the Irrigation and Forestry Sections became full divisions and the Health Division (called the Medical Division until 1931) was established, assuming certain duties formerly assigned to the Education Division.

In 1926 the Education Division was renamed the Administrative Division. In 1930, however, the Schools Section of the Administration Division was made a separate Education Division: and in the same year the Industries Section of the Administrative Division was replaced by the Agricultural Extension and Industry Division (later the Division of Extension and Industry). In 1931 the Alaska Division of the Office of Education, in charge of educational and medical work for Alaskan Natives, was transferred to the Bureau of Indian Affairs and its activities were gradually merged into those of the Education and Health Divisions.

There was a major reorganization of the Bureau in 1931. Two positions of Assistant to the Commissioner and a position of Chief Finance Officer (later Finance Officer) were established. Each of these new officials was given supervisory control over several divisions. The Assistant to the Commissioner for Human Relations was in charge of the divisions of Education, Health, and Agricultural Extension as well as the Employees Section (formerly in the Administrative Division) and a new Miscellaneous Activities Section. Under this Assistant was a Junior Assistant to the Commissioner in charge of matters relating to general field supervision, whose office in effect replaced the Inspection Division. The Assistant to the Commissioner for Indian Property supervised the Land, Forestry, and Irrigation Divisions. The Chief Finance Officer was responsible for all financial matters; and he was in charge of the Fiscal Division (formerly the Finance Division), the Purchase Division; and the Construction Section (formerly a part of the Administrative Division). The Probate Division was placed under the supervision of the Chief Counsel, who was in charge of all legal work of the Bureau. The Chief Clerk remained in immediate charge of the Washington Office and supervised the Mail and Files Section, the Statistics Section, and the library. The Administrative Division was abolished. In 1932 the Purchase Division was abolished and all purchasing activities were transferred to the Office of the Secretary of the Interior.

For the next several years the organization of the Washington Office was in a very confused state. In 1934, the position of the Chief Clerk was abolished and his duties were assigned to an assistant to the Finance Officer, whose office developed into the Administration Branch of the Bureau. New positions of Assistant to the Commissioner were established, but the specific responsibilities of the incumbents were changed frequently. The Statistics and Construction became divisions. The Employees Section, responsible for field personnel matters, was abolished in 1939, when the personnel work of the Bureau was centralized in a Personnel Division.

The Meriam Report (1928) found many deficiencies in the administration of Indian affairs. Among these were: (1) "lack of adequate, well-trained personnel"; (2) an inadequate system of public health administration; (3) "grossly inadequate" provisions for the care of Indian children in government boarding schools; (4) lack of evidence of economic planning; (5) "confusion" over legal and jurisdictional matters; and (6) a failure to develop cooperative relationships with other organizations which could be of assistance.

After the publication of the report, a change in policy was instituted. Indian administration improved, and the Indian Reorganization Act was passed by Congress in 1934. This act was an attempt to respond to the wishes of the Indian people to remain Indian, to maintain their tribal identity, and to control their own lives.

New divisions were established for expediting the emergency programs of the 1930's. These included the Civilian Conservation Corps—Indian Division (at first called Indian Emergency Conservation Work); the Roads Division; and the Rehabilitation Division, which was in charge of WPA projects. The Construction Division handled WPA projects other than those connected with irrigation and road work. The Indian Organization Division was established to supervise the formation of tribal governments under the provisions of the Indian Reorganization Act.

1934 also saw a highly significant but very subtle approach to reorganization of the Bureau. The Indian Reorganization Act contained a provision which sought to place Indian people in positions of authority so that they could administer Federal programs to Indian people. Senator Wheeler, who authorized the legislation, strongly defended Indian employment preference standards by agency, "It [the Indian Service] is an entirely different service from anything else in the United States, because these Indians own this property. It belongs to them."[19] He concluded that civil service had worked "very poorly" in administering Indian programs.[20] Unfortunately, the Bureau has not carried out the provisions of the Act strongly enough to effect an overhaul of the Bureau's employment procedures.[21]

In 1940 the Community Services Branch, the Resources Branch, the Administration Branch, and other branches were established. The Finance Officer redesignated Chief Administrative Officer, was put in charge of the Administration Branch. Each of these branches was made up of a number of divisions. In 1949 the terminology was reversed—the branches became divisions and the divisions became branches. An Assistant Commissioner was put in charge of the Division of Community Services, and another Assistant Commissioner was put in charge of the Division of Resources. More recently there have been created a position of Assistant Commissioner for the Division of Administration and a position of Assistant Commissioner for the Division of Economic Development. The Division of Resources has been abolished.

Since 1950, there have been various changes in organizational structure and some significant attempts to reorganize the Bureau. The most important structural changes occurred during the Nixon Administration. In 1969 the Commissioner of Indian Affairs, Louis Bruce, reported to the Assistant Secretary for Land Management, Harrison Loesch, who had competing responsibilities for the Bureau of Land Management, Outdoor Recreation, and Territorial Affairs as well as the Bureau of Indian Affairs. Bruce established two Associate Commissioners and five directors for Administration, Construction and Engineering, Finances, Education, Community Services, and Economic Development within the Bureau of Indian Affairs. As these directors began to pursue innovative programs, old-line bureaucrats felt the need for an intermediate voice in the structure, and a Deputy Commissioner was located between the Commissioner and his five Directors. This structure was overhauled after the Indian takeover of the Bureau of Indian Affairs Building in November 1972. Many personnel changes accompanied subsequent restructuring of the Bureau, and, for an interim period, no Commissioner of Indian Affairs was named. An Acting Commissioner headed the Bureau and reported to the Assistant Secretary for Management. In 1973, when Morris Thompson was appointed Commissioner of Indian Affairs, the Bureau was taken out from under the control of an Assistant Secretary, and the Commissioner was made directly responsible to the Secretary of the Interior.

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[19] Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73d Cong., 2d sess., pp. 256–257 (1934).
[20] Ibid.
[21] See also the Final Report of Task Force 9, part V, ch. II, pp. 163–213.

RECENT DEVELOPMENTS IN THE ADMINISTRATION OF INDIAN PROGRAMS

Dispersion of Federal Indian Programs Among Various Agencies[22]

It was not until 1929 that consideration was given to the possibility that agencies other than the Bureau of Indian Affairs should become involved in the provision of services and assistance to Indians. This view was first offered by Commissioner John Collier as a part of the new policies which were to emerge from the Indian Reorganization Act of June, 1934.[23] Commissioner John Collier defined one of his objectives under the new policy as follows: To abandon the tradition of Indian Office monopoly over the Indian Service, by drawing all available Federal and State agencies into the Indian Service.[24]

The prime motivation for this policy was due to Collier's conviction that the Indian Service should "shift from that of dispatch management to that of cooperative advice and technical assistance."[25] While many agencies of the Federal and State governments had begun modest efforts to serve the social and health needs of Indians after publication of the Meriam Report in 1928, there remained considerable reluctance among agency officials to provide services. This state of affairs was largely due to uncertainty about the extent of BIA responsibilities and the tendency of the Bureau to guard its turf and assert its control over Indian Affairs.

The Bureau of Indian Affairs, it was thought, was guilty of providing insufficient and substandard services. The remedy Collier sought was a movement "toward the sharing of responsibilities with other agencies"[26] in a cooperative intergovernmental effort to solve the economic, social and health problems so starkly revealed in the Meriam Report. As an example of how this system of cooperation could work, Collier asserted:

> Within the federal system, the outstanding unifications have been those between the Indian Service and the CCC (Indian Emergency Conservation Work), and the Indian Service and the Department of Agriculture (Soil Conservation Service). Continued or extended cooperation with the United States Public Health Service and with the Bureau of Animal Industry has gone forward. An entirely new collaboration with the Bureau of American Ethnology (Smithsonian Institute) has been achieved. Important help to Indians has been given by the Federal Emergency Relief Administration, the Agricultural Adjustment Administration, and the Land Program through the Resettlement Administration.
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> Not merely have these many cooperative and sharing arrangements increased the services given to Indians, they have, in addition, reacted in a stimulating and challenging fashion upon the Indian Office. Not a sequestration of Indians within the one federal bureau, but the largest use of all the agencies' helpfulness is the guiding principle in present Indian Affairs.[27]

The motivation for State cooperation was a result of Congress' passage of the Johnson-O'Malley Act[28] which provided that the Secretary of the Interior could contract with State and local agencies for the purpose of providing precollege education to Indian youngsters.

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[22] This section was taken from Task Force Three's Final Report, p. 39–41.

[23] Act of June 18, 1934, 48 Stat. 987.

[24] Records of the development of Collier's IRA Policy, RG 75, 56–A–588, 395, 50660–15–120. Federal Archives Records Service. Fort Worth, Tex. Indian Service Policies, galley 1.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] 48 Stat. 596; Apr. 16, 1934.

States in general were not willing to use State revenues to supply services and assistance to Indians due to the nontaxability of Indian lands—the principal source of social and educational revenues generated by States.

Through the 1950's and 1960's, the pace increased to place Indian support programs into other Federal agencies. Indian health was moved out of the Bureau of Indian Affairs in 1955 to the Public Health Service to facilitate more "expert" provision of services. The overriding policy was to "get the government out of the Indian business"—a policy which was to be achieved by moving the responsibilities for Indian services into other agencies, State governments and out of the Bureau of Indian Affairs. This policy was reevaluated with the advent of Indian self-determination emphasis fostered by "War on Poverty" legislation and policies begun in the early 1960's.

Indian tribes began to see the advantages of multiple agency Federal assistance programs as the flow of direct funding and assistance began to boost tribal economies in ways the Bureau of Indian Affairs never could. The Great Society programs of the Johnson administration became the first major breakthrough for tribal governments.[29]

> * * * although Indian tribes were not specifically mentioned in the delivery system provided in the Economic Opportunity Act of 1964, a crucial policy decision was made by OEO to make Community Action Program grants to Indian tribes, frustrating an attempt by the BIA to serve as an Administrative conduit for these funds.[30]

The infusion of OEO funds into tribal communities brought about vigorous efforts of tribal governments to serve their people by developing economic and social programs that they administered. Though the quantity of funds was not large, they nevertheless provided Indian tribes with the first real opportunity to plan their own future.

At the close of the decade of the 1960's and the beginning of the 1970's the Nixon administration began efforts to establish domestic assistance programs by expanding the Bureau of Budget into the Office of Management and Budget and through an effort to standardize Federal service regions, organize Federal regional councils, decentralize Federal granting authority to the regions and establish an integrated grant system for comprehensive development.[31]

For Indians, these administrative changes were couched as methods for insuring tribal self-determination. But inconsistencies in the treatment of tribal governments, poor communications, and arbitrary program requirements combined to create distrust of the new system. The policy of self-determination began to be seen as yet another form of assimilation and termination.

As these diverse programs for Indian people were placed in new agencies, it initially meant increased concern for and attention to Indian problems. In some ways, however, the newcomers to Indian Affairs have not been able to deal with Indian programs as effectively as the Bureau, with its century-and-a-half of accumulated expertise, has in the past. This trend now appears to have created a diffusion of attention in Indian affairs rather than an increased or more widely established attention to Indian affairs. This situation, which has developed from the history of past administrative changes in Federal administration of Indian programs, is today's problem. This current status of Federal administration is the subject of subsequent sections of this chapter.

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[29] Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs, University of New Mexico, AILC 76.

[30] Ibid., p. 1.

[31] Ibid., p. 2.

THE PRESENT STATE OF FEDERAL ADMINISTRATION OF INDIAN POLICY

OVERVIEW

The trust responsibility of the United States to Indian people today includes the permanent obligation to protect and enhance Indian lands, resources, and tribal self-government. The Department of the Interior is delegated as the prime agent for insuring that the necessary services are provided. The trust, however, is not merely a matter of concern for the Bureau, but extends to the Federal Government as a whole.

The entitlement to Federal services is additionally, twofold for Indian people. That is, as citizens of the United States, Indian people are entitled to programs and services provided by the Federal Government to benefit its citizenry on a level comparable to that of any United States citizen. Second, on the basis of treaties, statutes, and the course of dealings between the Federal Government and Indian tribes, Indian people are provided Federal programs and services as part of the legal obligation of the United States in executing its trust responsibility to Indian people. However, Commission research conducted over the past year through public hearings, surveys and interviews with tribal members and Federal officials has revealed that in spite of the dual entitlement Indian people have to Federal services, they are not actually receiving services available to other citizens of the United States.

FRAGMENTATION OF FEDERAL INDIAN POLICY

At least 9 cabinet-level departments and 10 individual agencies have programs affecting Indian people. Obligations for these programs totaled about $1.1 billion in 1974. Programs designed exclusively for American Indians amounted to about $950 million and programs with Indian set-aside funds amounted to $170 million. Furthermore, 5 temporary committees are engaged in studies which will have a direct impact on Indian interests.

The major departments with multiple programs relating to Indians are: Interior; Health, Education and Welfare; Agriculture; Housing and Urban Development; and Commerce. The Departments of Labor, Transportation, Treasury, State, and Defense also have major programs of importance to Indians. Along with these, the Department of Justice handles most of the legal problems affecting Indian rights.

The independent agencies with programs affecting Indians include: Federal Energy Administration, Environmental Protection Administration, the Federal Power Commission, the Commission on Civil Rights, the Small Business Administration, the Occupational Safety and Health Review Commission, the Equal Employment Opportunity Commission, and the Marine Mammal Commission.

Existing alongside of these are numerous temporary commissions whose studies and functions will undoubtedly affect Indian interests. They include such organizations as the AIRPC, the Commission on Water Quality, Commission on National Policy on Gambling, and the Community Service Commission.

The purpose and goals of many Native American programs are not adequately defined. This often leads to overlap and duplication of programs within the different agencies. Despite this overlap, many agencies provide such limited programs that even in combination, they fail to adequately meet the needs of tribes or individual Indians.

One example of this can be seen in the area of Indian housing construction. HUD is responsible for constructing housing units for Indian people. Program regulations state that HUD will construct the buildings if HEW agrees to provide plumbing and sewage facilities. Still another agency, BIA, is responsible for the construction of the roads leading to the home. As a result, HUD cannot begin construction until it has a commitment from HEW to put in the water facilities. HEW cannot agree to put in water until it has the exact location of the house. HUD, in turn, cannot provide the exact location of the home until the BIA stipulates where it will put in the roads and driveways.

These problems are compounded by the fact that each of the agencies involved receives separate funding from Congress. As a result, it is possible for HUD to have money available to construct homes but be prevented from doing so because HEW does not have the funds necessary to put in water systems or because BIA does not have the money to build roads to reach the homes.

This overlap in Indian administration also extends to State and local governments. Indian people may qualify for programs in three different ways: as tribal citizens, State citizens, and Federal citizens. While this sounds like an ideal situation, the result is quite often the opposite. For example, a State social service agency and HEW may both offer welfare programs to an Indian individual. However, the State may refuse to allow tribal participation in this program because it believes that Indians living on a reservation are a Federal responsibility. Federal agencies, on the other hand, may fail to provide a program of this type because they feel that such programs are already covered at the State level. As a result, Indian people find themselves excluded from State programs with no recourse through Federal channels.

This bureaucratic structure also creates other negative situations. Because of the layers of Federal, State and local employees charged with administering Indian programs, decisionmaking powers are often denied Indian people. One result of this bureaucratic entanglement is that Indian people do not know which agency to approach when they need assistance.

Because of the complexity of many Indian programs, there is a serious lack of coordination both within and between Federal agencies. As a result, Indian people often fail to realize many of the benefits intended for them.

The confusion surrounding application procedures for the various diverse Indian programs scattered throughout the bureaucracy was a topic of constant criticism in a number of task force hearings. In a hearing held by Task Force Three, for example, Robert Trepp commented:

> * * * programs directed toward American Indians operate within one of the several departments at the cabinet level * * *. This creates so much confusion that it is becoming impossible for the tribes to operate within the executive framework. It is not that the tribes, individually and collectively, lack the intelligence, capability and technical expertise necessary to deal with these cabinet departments. To the contrary, it is these cabinet departments, individually and collectively, which lack the capability and expertise to deal with the tribes and with each other.[39]

This lack of coordination often has very devastating effects in the construction area. The Department of Commerce, for example, will construct a hospital for tribal use without first checking to see if the IHS will have the necessary funds available to staff and equip it. IHS, not planning for this new program, does not have the money to provide immediate assistance. As a result, many fine facilities sit completed, yet unused.

Within the complex bureaucratic structure, there also exists a number of conflicts of interest which have been documented at length throughout this report. For example, the Department of the Interior which houses the Indian trust protection mechanisms also has the major responsibilty for the maintenance and development of Federal lands and natural resources. Because of this diversified area of responsibilty, the Interior Department often finds itself representing both sides when a controversy involving trust land arises.

The above-mentioned examples provide only a glimpse of the problems encountered in Federal administration. The following section will attempt to provide you an overview of the major departments involved in Indian affairs, their functions, and their shortcomings.

COMMERCE DEPARTMENT

Commerce Department has many programs for which Indians and tribes are eligible. Unfortunately, there is not widespread Indian participation in these programs. Indians are not informed of the availability of programs and the Department does not place much emphasis on Indian involvement. Significant efforts, thus far, have come from the Economic Development Administration and the Office of Minority Business Enterprises' Indian Desk.

Economic Development Administration

The Public Works and Economic Development Act of 1965, as amended, provides Indian tribes with economic development assistance under its various titles.

Beginning in 1967, the Economic Development Administration began a program with special emphasis on assisting Indian tribes residing on trust lands. The direction of this program has been primarily in the field of planning and technical assistance as well as the necessary "brick and mortar" money to construct community, training, and commercial facilities. As of 1976, Indian projects in 28 States have totaled $274,271,491 during the last decade.

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[39] Prepared testimony of the Creek Nation, p. 2, cited in final report of Task Force Three, p. 42.

Although Federal contribution for non-Indian governments is limited by a requirement of matching funds, Indian reservations are eligible for 100 percent assistance in most cases. In fiscal year 1974, $22,478,000 was set aside for the benefit of Indian tribes, out of a total EDA expenditure of $142,744,000.

Although the program has provided substantial benefits to Indian tribes, it has also created many problems. Insistence by EDA in imposing their own project priorities and inadequate planning and feasibility studies for Indian projects have resulted in empty reservation industrial parks and unprofitable and expensive reservation tourism projects. The promotion of an effort to bring industry onto the reservations has not developed employment and the original expectation of improving the economy. The agency has not coordinated its programs with other efforts, and the results have been delay, confusion, and overlap with other programs.

Office of Minority Business Enterprise

The purpose of this program is to promote the expansion, in size and number, of minority business enterprises, including those of American Indians. Assistance is made available in the form of project and research grants, advisory services, counseling, and the dissemination of technical information.

A minimum of 25 percent must be provided by a grantee from non-Federal sources; these funds may be cash or in-kind contributions. In fiscal year 1974, $1.8 million went to Indian beneficiaries under this program out of total expenditures of $41.5 million.

This agency's largest asset is its willingness to fund entirely Indian-run organizations to assist small businesses in receiving help from private and public sources.

The agency's greatest problem is its position of relative obscurity within the Department of Commerce structure. The Indian component does not have the organizational ability or prestige within the Department to properly coordinate with other agencies.

The Small Business Administration

The Small Business Administration is, perhaps, the least effective of the economic development agencies involved in Indian affairs. Fraught with uncertainty as to its role in Indian business development, with misunderstandings as to the status of trust realty and reservation citizen status in the banking system, and with confusion in its regulations as to recognition of eligibility of Indian-owned businesses, the agency remains in a state of inertia in Indian development concerns.

The Indian programs, and budgets of OMBE, EDA, the Small Busines Administration, and the BIA Economic Development Division, along with other economic development programs should be located in a single agency for better coordination and a more efficient delivery of Indian economic development budgets. In the interim, an

Indian office should be operated from the Office of the Secretary of the Commerce Department.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Assistance is provided to Indian tribes in establishing housing authorities to obtain benefits of HUD housing programs, in carrying out construction of the projects, and in managing them. Assistance is restricted to Indian tribes that are able to establish housing authorities and carry out programs under the U.S. Housing Act of 1949, as amended, and the rules and regulations of the Department of Housing and Urban Development.

Funding has been a problem at HUD since the "freeze" placed on housing development by the Nixon Administration. Also, as described in the introduction to this chapter, many HUD programs are not coordinated with other agencies and, many times, needed housing are not built because of conflicts with other agencies.

The most important program relating to Indian people is the Housing and Community Development Program.

Housing and Community Development

The Housing and Community Development Act of 1974 defines the recipient class as "units" of local government, and includes Indian tribes in this definition. Title I of the Act establishes block grants for community development and, although Indian tribal governments are eligible to compete for grants along with other local governments, no special set-aside is made for Indian tribes within title I.

Title IV of the Act authorizes the Secretary of HUD to make loans to public housing agencies to help finance or refinance the development, acquisition or operation of low-income projects by such agencies. For purposes of title IV, "public housing agencies" includes Indian tribes. In 1974, the Indian set-aside under title IV was $53,671,200.

Title IV of the Act revises sec. 701 of the Housing Act of 1954, making Indian tribes eligible for comprehensive planning grants. Funds are distributed among HUD's 10 regions on the basis of demand, need, and population. In 1974, the Indian set-aside under title IV was $1,636,000.

The entanglement of housing regulations between HUD and other agencies must be resolved. As soon as practical, housing matters should be delegated to the individual tribes, who are in the best position to solve their own housing problems if given adequate funding and technical assistance.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

The Department of Health, Education, and Welfare is heavily involved in American Indian affairs. Indians are eligible for the same programs for which all American citizens are eligible, but this basic eligibility is often overlooked in the confusion found in the relationship between Federal, State and local departments and agencies.

The areas of major Indian involvement by HEW are Office of Education (OE), Office of Native American Programs (ONAP), and the Indian Health Service (IHS).

Office of Education

The Office of Education provides funds and services mainly with three major programs.

1. Indian education grants to local education agencies: The objective of this program is to provide financial assistance to local educational agencies for the development and implementation of elementary and secondary school programs designed to meet the special educational needs of Indian children. Awards are in form of grants.

The program grants were $23,800,000 for 1974 and dropped to $22,700,000 for fiscal years 1975 and 1976. In addition to the reduction in funding, inaccurate monitoring systems make it unclear whether or not the designated funds are actually reaching their target populations.

2. Indian Education Special Programs and Projects: Grants are authorized under this project for planning, development, and implementation of programs and projects for the improvement of educational opportunities for Indian children. They are available to State and local education agencies, federally supported elementary and secondary schools for Indian children, and tribal and other Indian community organizations.

Final funding decisions are made by the Commission on Education upon recommendations made by the Deputy Commissioner of Indian Education. Because the funding grants are decided on by persons far from the field locations, their decisions are often questionable as to whether or not they have been made on sound needs and priority bases.

3. Indian Education—Adult Indian Education: This program provides Indian education grants for planning, development, and implementation of programs designed to stimulate basic literacy and high school equivalency opportunities for Indians in the shortest period of time.

The program asks for a local commitment after Federal funding; however, it has been shown that local districts do not pick up on Federal programs.

While it is quite clear that Indian adult education needs have not lessened, the fiscal year budget has remained at $3 million since 1974.

Indian Health Service

The Indian Health Service was created in 1955 as an improvement over the old BIA Health Service. Health service to Indians has improved, but there remains an overwhelming backlog of persons needing health care services. IHS does not reach all Indians, but many Indians are turned away by other institutions under the belief that IHS covers every Native American. IHS lack resources and does not coordinate with other agencies to deliver optional services.

Office of Native American Programs

The Office of Native American Programs, an office in the Office of Human Development in the Department of Health, Education, and Welfare, was established through the combination of the Office of Economic Opportunity/Indian Division, and the HEW Office of Indian Affairs in 1973 to respond to social and economic problems and needs encountered by Native Americans.

The most commendable, and paradoxically the most problematic, feature of ONAP is the flexibility of its programs. Its grants, which ranged from $10,000 to $5 million with an average of $293,000, were originally used for financial assistance for Native American projects, training and technical assistance, and research, demonstration, and pilot projects.

Implicit in the breadth and flexibility of this base were broad program goals which led to possible duplication of services. As a result, in 1975 ONAP outlined a series of precise goals and strategies narrowing its scope.

Unfortunately, even with a narrowing of its project scope, ONAP faces difficulties. The program has not yet fully developed its own policy and administrative structure; and these changes have not fully been communicated to the Indian population. The effectiveness of ONAP programs is clearly limited by its budget, which was only $27 million in 1975.

DEPARTMENT OF AGRICULTURE

Over the past 5 years, Indian tribes have defined their greatest potential for true and lasting development as those natural resources related to their lands: agriculture, aquaculture, timber, and energy. Of these four major resource categories, three fall within the jurisdiction and program expertise of the Department of Agriculture—agriculture, aquaculture, and timber; yet, little effort is made by USDA to design programs to assist tribes in the development of these areas of greatest economic development potential.

An issue of ongoing concern to tribes is the issue of nutrition. Major health problems on Indian reservations are attributed in large part to inadequate and poorly balanced diets. The two principal nutrition programs—the Commodity Food Distribution Program and the Food Stamp Program—reside in the USDA; yet no program exists within the Department to address this major problem.

The main USDA program that is designed exclusively for Indians and tribes is the Indian Land Acquisition Loan Program of the Farmers Home Administration.

Indian Land Acquisition Loan Program

Guaranteed and insured loans are made available to tribes and tribal corporations by Farmers Home Administration. The objective of the program is to enable tribes to mortgage lands as security for loans with which to purchase additional lands within reservations. These loans totaled $9.9 million in 1974.

Eligibility is limited to recognized Indian tribes, corporations, and Alaskan communities, which are without adequate uncommitted funds to acquire needed lands within the reservations and cannot obtain sufficient credit at reasonable terms from other sources. Use of the loans is restricted to the purchase of land for the benefit of a tribe or its members, and to pay expenses incidental thereto. Although the Secretary of the Interior must determine that lands to be acquired lie within a reservation or Alaskan community incorporated pursuant to the Indian Reorganization Act, review of the application and award of the loan is made by the local FHA. This is a valuable program for tribes to acquire needed land.

The Department of Agriculture uses the nebulous standard that all loans will be secured in a manner that will adequately protect the Government during the repayment period. Also, the small amount of money available ($9.9 million) does not allow participation by many tribes in need of additional reservation land.

Many rural Indians and tribes are dependent upon agriculture for their livelihood. The USDA should make information on this program and the others it offers easily available to Indian peoples and tribes so they can more widely benefit from them.

DEPARTMENT OF THE INTERIOR

The Department of the Interior contains the agencies that most directly affect the lives of almost every American Indian. In the Department of the Interior lies the responsibility of virtually all Federal lands and resources including water. In the Department of the Interior lies the trust protection of Indian lands and resources. And in the Interior Department lies the greatest conflict of interest, dealt with in detail through this report.

The Bureau of Indian Affairs, although it comprises the largest agency within the Department of the Interior, remains a stepchild in priority of program emphasis.

The Bureau of Indian Affairs

The Bureau of Indian Affairs employs over 16,000 personnel on a permanent basis, and up to 18,000 including part-time employees. In fiscal year 1977 the BIA budget was $777,019,000. The BIA controls programs in Indian education, tribal government, social services, trust protection, resources development, roads, law enforcement, and many others.

The Bureau of Indian Affairs is, most of all, an inefficient organization. Its principal problem is its inability to deliver program funds directly to Indians. In fiscal year 1977, the BIA returned $29.5 million in unexpended funds to the U.S. Treasury, at a time when its area offices were telling Indian tribes that "self-determination" grant funds were not available.[33]

Over the years the BIA has been seen by Indians as a paternalistic agency that did not respond to Indian needs. The BIA has many problems that overlap and contradict each other. Attempts have been made to correct some of the shortcomings of the Bureau. The latest being the Indian Self-Determination Act, Public Law 93–638, which is having a limited success.

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[33] Interview with Joseph Amaral, joint funding coordinator, Intergovernmental Relations and Regional Operations Division, Office of Management and Budget.

The Bureau is commented on in depth later in this chapter.

DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, PRCGRAM BUDGET SUMMARY

[In thousands]

	1973	1974	1975	1976 Availability	1977 estimate
Operation Indian programs:					
1. Education	187, 326	184, 187	226, 495	243, 085	255, 143
2. Indian services	116, 230	112, 885	98, 603	129, 531	154, 240
3. Tribal resource development	27, 184	29, 097	70, 360	83, 578	101, 374
4. Trust responsibility services	12, 414	12, 414	18, 661	21, 337	27, 450
5. General management—facilities operation	42, 855	43, 159	65, 013	73, 746	83, 143
6. Navajo-Hopi settle program				2, 115	4, 875
General administration [1]	6, 200	5, 319			
Total [2]	392, 209	386, 361	479, 132	553, 392	626, 183
Construction:					
1. Irrigation systems	16, 800	16, 800	26, 435	30, 400	30, 010
2. Construction, building and utility	32, 219	27, 200	35, 369	43, 522	47, 091
Total	56, 019	44, 000	61, 804	73, 922	77, 101
Road construction:					
General road construction	45, 539	43, 000	59, 500	66, 705	39, 075
Obligative authority			(60, 500)	(66, 705)	(68, 544)
Budget authority			(100, 000)		27, 205
Miscellaneous appropriation:					
Alaska Native claims	50, 000	70, 000	70, 000	70, 000	30, 000
Revolving funds-loans			38, 000	3, 000	
Laon guaranty			20, 000	10, 000	15, 000
Total appropriations	543, 767	543, 361	728, 436	777, 019	787, 359

[1] General administration is now distributed and identified as such.

[2] See the following table:

	1975	1976 availability	1977 estimate
Includes CSC employment and general programs	479, 132	553, 392	589, 510
Including pay raise	9, 318	10, 474	[a] 11, 500
Net increase over prior year	83, 453	63, 786	[a] 24, 618

[a] Estimates need program budget summary, 1977 for actual comparison.

Note: 1973 and 1974 used differing line items than present, rearranged for comparisons.

DEPARTMENT OF LABOR

The Department of Labor, Division of Indian and Native American Programs (DINAP), administers title III of the Comprehensive Employment and Training Act. The CETA program has been a real breakthrough in Indian programs. A summary of Department of Labor's Indian programs shows that titles II, III, and VI have distributed $128,040,001 to 91,000 participants in fiscal year 1977. Between 84–85 percent of the total appropriations for the CETA programs are delivered directly to tribal and off-reservation Indian communities. Further, the maximum allowable level of administration permitted is 20 percent. Administrative cost per participant averages approximately $231.

Indian CETA Program

Title III of the Comprehensive Employment and Training Act of 1973 (CETA) provides grants for comprehensive manpower programs and services for the benefit of unemployed, underemployed and economically disadvantaged Indians.

Eligible programs include skill and vocational training, public service employment, work experience, on-the-job training, and others. Eligible services include such items as child care and transportation. There is no separate appropriation for this program but it is funded by a set-aside of funds equal to at least 4 percent of the moneys allocated for the general manpower programs under title I of the Act. To date, the Department has not exceeded the minimum 4 percent floor established for funding the program.

CETA grants may be made available to qualified prime sponsors which include tribal governments and other Indian organizations. In fiscal year 1976, approximately $50 million was expended under title III. Since then the program has expanded.

A weak point of the program from the standpoint of many of the prime sponsors has been DOL's relative inability to provide more adequate technical assistance in a more timely fashion. While the program must be commended for its impressive delivery record to date, it should not weaken the programs of its Indian grantees by not having technical assistance available when needed.

DOL Economic Stimulus—Strategy for the Future

The Division of Indian and Native American Programs (DINAP) is presently preparing a program for the future to be directed at "economic stimulus" programs which will be concentrated on paramedical and health training; paralegal training; onsite management training; agricultural; road construction training; domestic fuel development; emergency vehicle operation, and other program designs of a similar nature. These programs have been recently targeted by the President as areas for new Labor Department emphasis. This program is estimated to be expended at $40 million in fiscal year 1978.

The relative success of the Indian CETA programs administered by the Department of Labor need to be examined closer by those who would attempt reform in Indian administration. An examination of the legislation may provide the answer since limitations on administration and specific program set-asides are provided for in the statute.

Tribal Eligibility for and Utilization of Federal Domestic Assistance Programs

The service delivery system, which provides Federal domestic assistance programs to eligible applicants, is generally administered through units of State and local government. Of the $60 billion which was expended in Federal domestic assistance in 1976, 75 percent was administered through States.[34]

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[34] Tribal Government Task Force (Number Two) Final Report.

This system for the delivery of services places tribal governments in a position which is in direct conflict with established Federal policy and even the earliest Supreme Court decisions articulating the Federal-Indian relationship.[35] This jurisdictional relationship is discussed in chapter 5. Because 75 percent of all Federal domestic assistance programs are administered through State governments, it is important to analyze the conditions in which tribal governments are forced to come under the jurisdiction of the States to receive Federal domestic assistance. Requirements of State incorporation of tribal enterprises, for eligibility under some Federal domestic assistance programs (Small Business Administration Programs) are in direct conflict with the Federal-Indian relationship. This relationship guarantees the jurisdictional independence of tribal governments from State governments. The recognition of tribal sovereignty and the powers of tribal governments provides a solution to this problem, by asserting the power of a tribe as equal to that of a State, for incorporation of tribally chartered enterprises and organizations. A State, as a dependent sovereign, has the power to recognize its political subdivisions or enterprises as eligible units for Federal domestic assistance; then a tribal government, which bears a similar status in the Federal system also must be recognized as having the power to incorporate the enterprises which come under the jurisdiction of the tribal government. Historically, tribal governments, as local governments eligible for Federal programs, are often overlooked in the planning stages of Federal programs. The problem is compounded further by a lack of sufficient congressional guidance of executive agencies charged with the responsibility of service delivery.

Congress has authorized special Indian programs in virtually every Federal department. Nevertheless, Federal domestic assistance program agencies are hesitant in determining eligibility of Indians for Federal programs, and in using tribal governments as the primary service delivery mechanism on reservations. As a result, Indian tribes are denied the resources of a majority of Federal domestic assistance programs in their efforts toward development and self-determination. No effort is made to include Indian tribes in the majority of Federal programs, and to the extent that tribes do participate, it is often under adverse conditions.

There is a great variety of mechanisms for delivery of Federal domestic assistance to the community level. Sweeping recommendations with respect to service delivery may not be appropriate in all circumstances. The Congress is urged to adopt the policy that each Federal domestic assistance agency must recognize tribes as governmental units for the delivery of services. With such a mandate, the consolidated Indian affairs agency should coordinate all Federal agencies in developing procedures for such a delivery system, in conjunction with tribes themselves.

Recent legislation suggests that tribal governments should be accorded full recognition throughout the system of Federal domestic assistance (General Revenue Sharing Act; Comprehensive Employment and Training Act; Joint Funding Simplification Act; Indian

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[35] E.g. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Self-Determination and Education Assistance Act; Indian Financing Act). Because of the highly complex nature of Federal domestic assistance, many inconsistencies remain in the treatment of tribal government. These deficiencies relate to the threshold question of the eligibility of Indian tribes and tribally chartered organizations and to the character of tribal participation in the delivery.

Of the 598 Federal domestic assistance programs studied by the President's Council on Federal Assistance Review only about 78 had direct tribal participation. It would require a study of mammoth proportions to outline the specific steps needed to integrate Indian tribes and tribally chartered organizations into the delivery system of all 1,000 programs. A Special Action Office on Indians in the White House, acting under a strong congressional mandate, could work with the tribes and the various departments to develop an appropriate delivery system. It could also develop a planning mechanism to assure that goals are set by the tribes and that Federal dollars are targeted to reach those goals, while concurrently establishing an independent agency for Indian Affairs.

The Congress, in creating these 1,000 programs, determined that they were of considerable importance in assisting State and local governments to meet pressing local needs. The promise of Indian tribal self-determination, repeatedly made by both the Congress and the executive branch, can hardly be implemented if Indian tribes are denied the right to participate in the basic programs available to every other government in the United States. Given the relative severity of social and economic problems in Indian communities and on Indian reservations, it is suggested that each domestic assistance agency should not only be required to serve Indians, but should be directed to devote a share of the total program resources in proportion to the need, rather than in proportion to the population as well.

Congress has recognized the need for Federal domestic assistance programs to be made relevant to local governmental capabilities and needs in its passage of the Joint Funding Simplification Act. This Act authorizes the waiver of administrative requirements which force local units of government to set up a vast array of financial management and auditing the waiver of administrative requirements which force local units of government to set up a vast array of financial management and auditing procedures beyond their ordinary capabilities. The Act is targeted at reducing duplicatory procedures conducted by each Federal agency, and is aimed at encouraging Federal agencies to cooperate with one another in responding to the needs identified by an applicant unit of government. The successful negotiation of an integrated grant, provided for under the Act, has been achieved by the Salt River Tribe of Arizona. Funding of 41 Federal domestic assistance and BIA programs is coordinated into one integrated grant. The cooperation of the Federal agencies involved in the Salt River project has shown that joint-funding to meet tribal government-identified needs can be accomplished, and that the entire Federal domestic assistance program delivery system can be coordinated for maximum effectiveness. Assuming the goal of the Federal Government in providing Federal domestic assistance programs to State, local and tribal governments is to assure such maximum utilization of funds and services, then the implementation of joint funding mechanisms must be pursued through governmentwide cooperation among the Federal agencies concerned.

The Federal domestic assistance program delivery system should be made relevant to the congressional and Supreme Court recognition of the status of tribal governments within the Federal system, and the goal of economic self-sufficiency articulated in the Indian Self-Determination and Educational Assistance Act.

To assist with implementation of this recommendation, to provide the program coordination that would be necessary to assure maximum impact from Federal resources, and to target Federal programs for maximum benefits for Indian development, the task force has recommended the creation of a Temporary Special Action Office on Indian Affairs in the White House.

ACCESS TO PROGRAM INFORMATION

Access to Federal program information is a crucial preliminary to the use of Federal domestic assistance programs by all governments, including tribal governments. The Federal Government provides Federal program information through its annual issuance of the Catalog of Federal Domestic Assistance Programs, which contains descriptions of the 1,030 Federal domestic assistance programs now offered by the 55 agencies of the executive branch. The catalog is distributed to all state, local, and tribal governments and attempts to provide all relevant information necessary to determine eligibility, by the applicant government. Eligibility is defined in the authorizing legislation of a program act or in the administration regulations associated with an act.

However, since Congress and its numerous committees, established to deal with the entire scope of the Federal responsibility have not always been conscious of the political status of tribal governments in creating authorizing legislation for Federal domestic assistance programs, tribal government eligibility for any particular domestic assistance program may not be specified in the catalog. A tribe has no means of ascertaining statutory barriers in the authorizing legislation or program act, which would prevent tribal government eligibility for a given program.

Additional information, relating to Federal domestic assistance programs, is made available to state and local units of government through the Intergovernmental Cooperation Act of 1968. Among its stated purposes is the establishment of a commission which would bring together representatives of Federal, State and local governments for consideration of common problems. A forum would be provided for discussing the administration of Federal grants and other programs requiring intergovernmental cooperation. In addition, this group would recommend the most desirable allocation of governmental functions, responsibilities and revenues among the several levels of government. It would also recommend methods of coordinating and simplifying tax laws and administrative practices to achieve a more orderly and less competitive fiscal relationship between the levels of government.

However, at the time the Intergovernmental Cooperation Act was passed, tribal governments were once again overlooked as eligible units of government that would benefit from and contribute to this process. Thus, the access to Federal program information affecting Indian people is denied tribal governments.

The solutions to these problems are embodied in a bill now pending in Congress—the Federal Program Information Act, and a proposed amendment to the Intergovernmental Cooperation Act. If enacted, the Federal Program Information Act would create a data base of all Federal domestic assistance programs, and would provide comprehensive coverage of authorizing legislation, program acts, and administrative regulations. This bill has the potential of increasing the flow of Federal program information to tribes. If properly constructed it would specify tribal government eligibility, as well as administrative requirements which might affect the prime sponsorship status of the tribal government.

TECHNICAL ASSISTANCE

Technical assistance for Indian tribes foster their socioeconomic stabilization and development. It is a crucial aspect of any effort by the Congress or executive branch to encourage Indian people in the performance of their own management, administrative, and technical functions. Technical assistance should be made available primarily for development of threshold management capabilities and to provide economic support activities. This type of assistance is presently the responsibility of several departments within the executive branch, including the Office of Native American Programs and the Indian Health Service in the Department of Health, Education, and Welfare; the Office of Minority Business Enterprises and Economic Development Administration in the Department of Commerce; and other offices in the Departments of Labor and Housing and Urban Development. Concentration of technical assistance requirements and potential, however, is appropriately within the Bureau of Indian Affairs.

Indian tribes and organizations are not encouraged to, and are often discouraged from, making their own need assessments for technical assistance.

Agencies make evaluations and attempt to apply national solutions to local situations.

Agencies predetermine contractors and technical assistance personnel, in violation of Federal procurement and regulations and existing Indian preference laws. Contractors and personnel hired feel they are responsible to the Federal Government, rather than to tribes.

Federal employees retained for technical assistance projects are often not specially trained in the subject area.

Federal domination prevents tribes and organizations from increasing their own capacity and maintaining technicians of their own. This perpetuates the system of Federal control.

Autocratic three-tiered Federal structures use appropriations as a source of power, rather than for direct assistance. Each level shares in this distribution of power within the bureaucracy, rather than directing it to tribes.

In most cases, Federal agencies actively resist, more than encourage, the development of corps of Indian technical specialists. This perpetuates the employment of Federal bureaucrats and non-Indian contractors.

The present Bureau of Indian Affairs' technical assistance service is one of the principal sources of these problems. The organization is inadequate for many reasons. Personnel are not appropriate to the requirements of a specialized technical assistance effort. There are no specialized technicians within the Bureau of Indian Affairs to provide for the rapidly increasing demand for specific expertise in highly technical areas. The depth of training and necessary experience precludes using or retraining existing personnel, in most cases. The present autocratic organizational structure is also not flexible enough to permit technicians to move quickly from area to area.

Many reasons can be given why an organization, geared to supervision and trust administration, is not appropriate to assist Indians in highly specialized and technical areas. The important point, however, is that new methods must be devised to deliver services more directly to Indian tribes.

In evaluating methods to adequately provide services to tribes by Federal agencies the obvious is often overlooked. It is clear that one of the methods which could be used is to deliver contract funds directly to tribes, for the purposes of purchasing their own technical services. There has been a great amount of success in this area. As a matter of fact, many of the more successful tribes, who have developed sophisticated and efficient management and economic systems, have done so by purchasing their assistance from the open market. In many instances, initial technical assistance should be provided to tribes to enable them to understand and use procedures for acquiring further technical assistance. According to the final report of Task Force Number Three:

> There continues to be, in spite of studies conducted in recent years, an inequity existing in technical assistance and services delivered to Indian tribes. The tribes equipped with capable technical staff and financial resources are more successful than smaller, less well-developed tribes in preparing basic proposals to secure funds for Federal program assistance.

The notion that all services must be rendered by civil service employees is outmoded, if not completely obsolete. Other agencies within the executive branch have provided far more effective methods. For instance, the Office of Native American Programs and the Indian Desk of the Office of Minority Business Enterprises have provided for "call contracting". A tribe, enterprise, or individual may call on the services of a contract technician in a specific management or economic area by making a request to the contractor or agency. In this procedure, an assessment of the report is made, and a specialist is assigned who must file a written report in a predetermined number of days. The Economic Development Administration already contracts virtually all of the Indian technical assistance efforts.

Another helpful procedure would be the establishment of a national skills bank. This bank, or list of available technical talent, could provide, as one of its many byproducts, an inventory of skilled contract technicians in many management and technical areas. Individuals could be made available on a schedule basis and be reimbursed by a national technical assistance contract funded by executive departments.

Associate consultants and prime contractors should, of course, be predominantly Indian. Indian preference in employment and contracting through sec. 7(d) of the Indian Self-Determination Act, should be observed. Requirements in each of the technical positions in this crucial area would be based on highly specialized qualifications.

The contract funds could be provided collectively by the Department of the Interior, the Department of Commerce, the Department of Housing and Urban Development, the Department of Labor, the Department of Health, Education, and Welfare, and the Department of Agriculture, as well as others. There are more than adequate amounts of technical assistance financing available from existing appropriations and executive authority.

For instance, through the Indian Financing Act, the Bureau of Indian Affairs is permitted 4 percent of its annual appropriations for technical assistance. There is no proviso that this budget has to be utilized by civil service employees. The Indian Self-Determination Act also has ample funds available which are presently administered by both the BIA and the Indian Health Service. The early poor administration of P.L. 93–638 grant and technical assistance funds, by IHS and BIA, suggests that Federal agencies often are not the best administrators of self-help mechanisms.

The fundamental precepts of self-determination stand in stark contrast and opposition to agencies which commandeer Indian appropriations for their own purposes and turn a facilitating mechanism for direct use by Indians into a BIA or IHS program. Indian tribes, organizations, and individuals need money to exercise self-determination and to purchase technicians directly who are not available in either one of those agencies. This is essential to accomplish their management, training, and economic development goals expeditiously.

A recent review of the Indian Technical Assistance Center Activities in Denver and on some of the reservations, prompted an observation that has been felt by Indian people over a long period, i.e., that the sooner tribal level control was developed and used the sooner the tribal participation effort would become productive. While the review has a critical complaint, it does recognize certain organizational thrusts not heretofore recognized as significant by the Bureau. The following is quoted from the Review of the Indian Technical Assistance Center (ITAC) at Denver, Colorado, by Robert Hemmes dated January 14, 1977:

> The unique opportunity the ITAC has before it is to fill the void between the Bureau and the tribes that has been the source of years of castigation and criticism of the Bureau. Until recent years no real opportunity existed for a remedy, but through evolution of a series of contradictory and criss-crossing policies over the last 100 years, we have now arrived at the first opportunity to implement Indian self-determination. Necessary legislation has been passed and attitudes have come into consonance whereby the Bureau may assume its role of providing technical support and resources to assist in Indian self-government and self-determination.
>
> The missing link in the Bureau/tribal relationships is the lack of a responsive unit of the Bureau to listen to tribal leaders and to inventory tribal needs and opportunities. The Bureau is hierarchically oriented—it carries out legislation, issues manuals to its staff, writes procedures for tribes. ITAC is tribally

oriented—it is responsive to tribal attitudes and needs. In current argot it could be said that the Bureau works from the "top down" and ITAC operates from the "bottom up." Unfortunately, there is an "error of closure" where they meet. Ideally the Bureau would provide the function, or process, of integrating Federal legislation and resources with tribal governments and needs. Through circumstance the Bureau is not providing this function and ITAC has filled the gap.

The unique opportunity facing us is to culture and nurture ITAC into an operating model for the process of delivering obligatory and necessary Federal support and resources to tribal governments and the Indian people. The process should be a two-way street. The process should "see" the Federal/bureaucratic constraints and charters, but also the tribal and Indian viewpoints, goals, and needs. The process should reconcile the two ends of the street in an optimal manner.

This sort of process would be innovative not only in the Bureau, but in the Federal government. The Federal departments are much like the Bureau in their isolated functionally oriented charters. They, too, put the burden of coordination on their constituencies—the State and local governments, Metropolitan Planning Organizations, etc. The function of government, whether in the Bureau or the Federal department, is to do for the people what the people cannot do for themselves either individually or through their local (tribal) governments. The Federal government (Bureau) should at least be capable of organizing and coordinating its own resources to support the people. The people and the local governments should at least be capable of choosing their own feasible future from among the alternatives and organizing, inventorying and coordinating their needs and requests to the Federal government. And there should be a process for the reconciliation of the two.

The ITAC opportunity is to continue the momentum and goodwill it has with respect to being responsive to the tribes, but temper this with its Federal obligations. ITAC, with encouragement and guidance from the Bureau could become the model for the missing process.

Eventually, the Bureau could emulate the ITAC model and escalate the program from a process to deliver small and scattered projects to one that would turn on the full force of the Federal $2 billion per year in an optimal manner for the enhancement of the welfare of the Indian people.

INDIAN PREFERENCE IN CONTRACTING

The use of Federal contracting and procurement to enhance Indian economic development and promote Indian enterprises has had little impact. Despite large Federal expenditures, unemployment among American Indians still far exceeds the national average; the income level of tribal people is still far below the national average; and the number of viable Indian-owned economic enterprises remains low and is increasing at a pace far slower than for other minorities.

Since early 1975, a primary focus of the effort to upgrade the economic situation of American Indians has been the Indian Self-Determination and Education Act (Public Law 93-638). This law establishes a policy that the United States Government will transfer, from the Federal Government to the Indian people themselves, control of Federal services and programs for Indians. To achieve this transition, Public Law 93-638, section 7(b) requires all agencies of the Federal Government to subcontract, to the greatest extent possible, with Indian tribes. Further the Act requires that preference be given to hiring Indian personnel for these programs.

There are now three elements involved in evaluating Indian contractors either in applying for or engaged in contract work on Indian programs.

Qualifications

The standards of qualifications as now required in general procurement regulations by the General Services Administration are extremely difficult to meet by new businesses, much less new Indian businesses. Evaluating the qualifications of the background of any contractor is necessary to determine:

the successful experience of the prospective contractor;
the financial stability to manage and finance the operation;
the qualifications for bonding under normal bonding processes;
the capability of drawing upon general craftsmen through labor unions or tribal governments.

In assessing applications of new contractors, the majority of skilled Indian craftsmen desiring to enter the business usually lack the experience normally required. It is initially necessary to acquire the necessary experience for supervision, training, and administrative activities involved in operating and conducting business as well as performing the work required under the contract. Technical assistance and training have been provided Indian people throughout the country for some time and now that contracting activities provide an opportunity for establishing privately owned contractors the general qualifications still eliminate them because of inadequate contracting experience.

Inspection for Satisfactory Performance

The technical assistance and training programs on Indian projects should be continued during the operation of a contract so that inspections of compliance to specifications would be more in the form of assistance and an effort to keep the performance at a satisfactory level, rather than of such a critical nature that Federal inspections would tend to quell, terminate, or paralyze a contractor because of difficulties being experienced during the performance of work. The Indian Federal efforts for giving aid through technical assistance, training and supervision and the development of self-sufficiency for tribal enterprises or private entrepreneur is defeated unless a coordinated effort is continued through the contracting process. Inspections should be often or continuous with the objective in mind of helping the contractor accomplish satisfactory production.

Termination of Contracts

Under normal circumstances of Federal procurement regulations, deficiencies noted in contracts are justification for withholding payments, stopping work, renegotiating specifications, or terminating and suspending operations of a contract. In the case of Indian projects under the authority of tribal governments, it should be required that no unilateral decisions of this nature be made to prevent discouragement or failure and bankruptcy of new Indian contractors. It should require a coordinated meeting of the tribal government representatives, the U.S. representatives and the contractor to discuss the means of correcting deficiencies. Should the ultimate decision be made to change contractors, employees should be permitted to stay, activities should be coordinated so as to prevent serious interruption of the total program. In the recommendations of the contracting study, such elements have been considered in the review of past history and failures have developed even though EDA has provided feasibility surveys to all non-Indian contractors and providing its own technical assistance and training activities. Yet, in this report, specifically in the development of industrial park projects, 90 percent of the projects have resulted in significant failures. It is considered necessary to negotiate contract supervision through private sources as well as taking advantage of governmental technical assistance.

PROBLEMS IN PUBLIC LAW 93-638 IMPLEMENTATION

A major reason for the limited success achieved in the field of Indian management and economic development is that Federal agencies have failed to implement the mandates of Public Law 93-638. This conclusion is supported by a special study [36] conducted for the American Indian Policy Review Commission.

Widespread confusion exists among the various agencies as to the scope and applicability of the Act. Several agencies simply do not see the Act as applicable to their programs. Other agencies (DOL, DOT and HUD) recognize the Act as applicable only to those programs which are statutorily mandated for the benefit of Indians.

Even among those agencies accepting Public Law 93-638, there is a prevalent feeling that the Act conflicts with existing Federal procurement regulations and with Executive Order 11246, which requires all Federal contracts to include a clause prohibiting racial discrimination.

The American Indian Policy Review Commission's special contracting study cites several other reasons for the failure of Federal contracting to significantly increase Indian self-determination. Study interviews demonstrated that Government agencies consistently fail to recognize tribal sovereignty and the unique trust and treaty obligations of the Federal Government to American Indians.

The Small Business Administration's policy discriminates against communal ownership and tribally chartered corporations. This effects situations where bonding is required of an Indian contractor.

The lack of a list of Indian contractors has made it difficult for agency contract officers to identify qualified Indian contractors. The BIA maintains the most recognized list but even this is limited. Significantly, the lack of an Indian contractors' list implies that qualified Indian contractors are unavailable.

The absence of a governmentwide policy to provide clear direction in standard contract language was identified as a major obstacle to Indians who do manage to secure government contracts.

OLD PROBLEMS

The Bureau of Indian Affairs

The Bureau of Indian Affairs was established in 1832,[37] to implement those duties of the Department of the Interior as the delegated prime agent in carrying out the United States' trust responsibility to Indian people. The trust principle includes the permanent obligation to provide those services necessary to protect and enhance Indian lands, resources, and tribal self-government. In addition, under the

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[36] Tribal Government Task Force (Number Two) Final Report, pp. 41-42.
[37] 22d Cong., 1st sess., ch. 174, sec. 1.

Snyder Act of 1921,[38] Congress further authorized expenditure of appropriations by the Bureau of Indian Affairs for the general support and "civilization" of Indians.[39] To accomplish these ends, the Bureau of Indian Affairs, by their own varying estimates, employs between 13,000 and 18,000 permanent and temporary employees and provides services under 33 program title, all of which are specifically targeted at providing services to Indian tribes and their members.

Administrative Problems Determined by the BIA Management Study

The delivery system through which Bureau programs are administered is composed of a central office located in Washington, D.C., 12 area offices representing broad regional divisions, and 82 agency offices representing subordinate field installations. The inadequacies of this complex organizational structure in establishing an effective service delivery system has been consistently documented in the 75 studies of the Bureau of Indian Affairs conducted over the past 25 years, including the most recent BIA Management Study,[40] mandated by this Commission under Public Law 93-580. Moreover, complaints of Indian people addressing the Bureau's service delivery system number in the thousands.

The Bureau is a frequent target of criticism both by the Indian people and Congress. Therefore, numerous studies have been undertaken by various Federal agencies and other organizations. The last major comprehensive review was the Meriam Report of 1928, which helped foster widespread reforms during the 1930's. However, since the original intent of these reforms has been compromised and distorted, urgent problems and confusion as to Indian goals and actions led to the creation of the American Indian Policy Review Commission.

A review of the findings of each of these studies points to problems in administration of the Bureau programs which are directly related to the organizational structure of the Bureau. The layered system of administration which exists in the Bureau means that out of every dollar targeted for Indian programs, the costs of administration for each level of Bureau organization must be extracted first. Estimates of that percentage of each Indian dollar which is used to administer the BIA organization range from 78-90 percent. After administrative costs for program operation have been extracted at each level, there is only a small amount of funds left to operate a program at the reservation level, often too small an amount to effectively deliver services.

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[38] 25 U.S.C. sec. 13.

[39] The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

General support and civilization, including education.

For relief of distress and conservation of health.

For industrial assistance and advancement and general administration of Indian property.

For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.

For the enlargement, extension, improvement, and repair of the buildings and grounds of existing plants and projects.

For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges, and other employees.

For the suppression of traffic in intoxicating liquor and deleterious drugs.

For the purchase of horse-drawn and motor-propelled passenger-carrying vehicles for official use.

And for general and incidental expenses in connection with the administration of Indian Affairs. Nov. 2, 1921, c. 115, 42 Stat. 208.

[40] BIA Management Study, Final Report of the Task Force on Federal Administration and Structure of Indian Affairs to the American Indian Policy Review Commission, 1976.

Indian people question the Bureau's administrative overhead as it affects the level of services they receive and particularly question the need of the area offices. Decisionmaking is likewise impeded by a pervasive lack of communication between agencies, area offices and the central office. Tribally generated suggestions for change in programs and services to better meet tribal needs is information that is slow to flow upwards, remedies to effectuate needed change must pass through channels which resist change and narrow the effectiveness of central office-generated problem solutions. The result is a breakdown in the service delivery system of Bureau programs. Indeed, review of the data collected by this Commission and contained in previous studies of the Bureau of Indian Affairs reveals that Indian people are *not* receiving the full degree of services and funds from specially targeted congressional appropriations earmarked for the benefit of Indian people.

EXHIBIT II[1]

FISCAL YEAR 1976 EXPENDITURE DATA, ALL FUNDS BY OFFICE

	Banded (thousands)	Unbanded (thousands)	Total (thousands)	Per Indian served
Aberdeen	$68, 024. 8	$21, 007. 6	$89, 032. 4	$1, 823
Albuquerque	39, 351. 0	9, 847. 3	4[illegible]. 3	1, 449
Anadarko	23, 708. 1	1, 402. 5	25, [illegible]. 6	1, 059
Billings	31, 293. 7	13, 188. 7	44, [illegible]. 4	1, 461
Eastern	13, 237. 7	1, 756. 0	14, 993. 7	960
Juneau	47, 006. 2	6, 479. 0	53, 485. 2	1, 075
Minneapolis	14, 757. 0	1, 951. 8	16, 708. 8	686
Muskogee	28, 604. 1	15, 917. 2	44, 521. 3	712
Navajo	174, 447. 0	48, 638. 0	223, 085. 0	1, 632
Phoenix	86, 064. 5	34, 398. 8	120, 463. 3	2, 719
Portland	76, 721. 1	19, 494. 1	96, 215. 2	3, 632
Sacramento	14, 515. 8	1, 847. 3	16, 363. 1	490
Central office		111, 705. 9	111, 705. 9	
Public school grant		26, 845. 0	26, 845. 0	
Total	617, 731. 0	314, 479. 2	932, 210. 2	

[1] From working papers of "BIA Management Study," American Indian Policy Review Commission.

Exhibit II illustrates the state of the grossly inequitable distribution of appropriations far beyond what should be permitted by administrative discretion. The BIA should be forced to utilize a system which distributes funds equally by program from a clearly defined formula. Variables to this should be clearly justified and subject to tribal appeal.

The study makes 23 recommendations in these management categories: Budget; personnel; and management information. A section on organization structure and implementation is included. The study is confined to management principles which erect barriers and influence the quality of response to Indian needs.

Some Internal Management Problems

A number of problems which significantly dilute the overall effectiveness of the Bureau of Indian Affairs have been identified. For each problem, a solution has been proposed and the benefits which can be expected outlined. The recommendations of previous studies failed as effective management tools for the same reason: None of them had a specific mechanism for followup or "forced" implementation. In most instances, there was virtually no follow-through of the solutions suggested. Something more than problem identification and proposed resolutions is necessary.

More serious weaknesses observed were:

1. There is a notable absence of managerial and organizational capacity throughout the BIA.
2. Decisions are made on a day-to-day basis with little long-range planning.
3. Communications among the organizational levels are poor, as are agency-tribe relationships.
4. Evidence of critical analysis and determination of appropriate performance standards for key positions are almost nonexistent.
5. Employee attitude and morale are poor.
6. The budget system (Band Analysis) is inadequate.

Organization

BIA internal communications are poor and the absence of two-way communications for transmittal of vital data seriously impede the effectiveness of the Bureau. Information filters down from the central office to area directors and agency superintendents, but not discussed—it is imposed upon tribal governments.

During the course of this study, a number of organizational problems were observed. While many are referenced in other report sections, there is a need to modify the Bureau's overall organizational concept.

Directives are often superficial and inappropriate. Almost continual internal reorganization and changing interpretations create a rumor-intensive environment where many employees spend excessive time generating or reacting to rumors. The effect on morale is highly detrimental and reflected by poor employee motivation and performance.

Due to the program-oriented structure of the BIA, broad areas of control are allowed to exist—particularly at the local level. This results in the inability of agencies to receive sufficient specialized program guidance.

At present, each level is self-contained with responsibility for both program and administrative activities.

Excessive controls at the area level make it impossible for tribes to exercise any degree of self-determination.

The present structure allows for the existence of separate and conflicting areas of function. The result is poorly managed project techniques planned in inadequate time periods.

Evidence of critical analysis and determination of appropriate performance standards for key positions is almost nonexistent and achievements in most areas are not measured against appropriate yardsticks. Clerical procedure wastes time, hampers program development and promotes bitterness among tribal officials. Directories and organization charts were often out of date. Formalized communications do not exist between the policy planning staff and areas, agencies, and tribes.

A definitive organization structure and decisionmaking process does not exist. Although the present organization contains stated budget functions, in some instances, the budget formulation and control functions at the area level are organizationally separated. This type of structure limits direct communication and fosters misunderstanding.

Responsibility for some programs is unclear because activities are split.

Personal contacts among Bureau program management personnel are inadequate and infrequent. The area offices operate as separate entities which limit communications, particularly face to face, either vertically or horizontally. This has led to isolation which makes general policy implementation and organization unity difficult to achieve.

The Bureau's program is not sufficiently consistent and coordinated. Objectives are developed and met as individual projects. Therefore, results are not responsive to the objectives.

There is a notable absence of mangerial and organizational capacity throughout BIA. Decisions are made on a day-to-day basis with little long-range planning. Communication among the organizational levels is poor as are agency-tribe relationships.

Budget

Project planning, as a management tool within BIA, does not ensure the timely completion of activities. Work plans are not considered important and are not updated when schedules are missed. Timing is confused because of inadequate feedback. Project planning is not considered a high priority at the agency level because experience has indicated that generating plans for other than major projects is a waste of time. The plan is either not included in the budget, reworked later, or not adhered to because the available time and effort was directed to some unplanned requirement.

New programs are not developed to meet the needs and desires of the tribal governments. Obsolete programs are continued; duplication of effort is required to "guard the integrity of programs for accountability;" tribal development plans are not used as a basis for Bureau planning and budgeting.

Limited communication between the agency and the tribe causes more than half of the budget to be determined without local needs analysis. Because budget-planning information flows under the assumption that each level understand it, the resulting action at lower levels are different than intended.

The present budget system only measures the funds spent against the amount budgeted, without determining results. Thus, the effectiveness of managers, organizations, and programs is not measured.

Tribal willingness to learn and understand the budget system exists, but effective leadership in the BIA is deficient.

There is no guarantee that either agencies or tribes have appropriate administrative knowledge concerning area office funds. This probably accounts for much of the antagonism between tribal governments and area offices.

BIA planning does not deal with the future beyond an 18-month time span. This system prevents effective decisions regarding future goals. Dollar availability of target planning allowances set by OMB does not adequately cover the financial requirements of individual tribes.

The purpose of self-determination is "To provide maximum Indian participation in the government and education of Indian people, to provide for the full participation is a logical and laudable objective but is not fully supported to improve relations between the Indian community and the Government."

However, there is a larger issue in regard to client participation which should be noted. Less than 30 percent of the Bureau's budget is subject to any form of Indian participation. Hence, the extent of present involvement cannot be interpreted as Indian determination of Federal spending priorities. Under the present system, a tribe can make tradeoffs within the BIA budget which accurately reflect relative priorities and yet receive a total package of goods and services which do not meet those priorities due to insufficient influence on decisions affecting them.

The band analysis concept as used by BIA is indicative of an effort to obtain tribal viewpoints. However, many Indians today are dissatisfied with it. Some current issues and problems are:

The budget is set by OMB prior to tribal consultation and decision.

In developing some tribal programs, BIA planning activities are aligned to a budget process, which furnishes projections for periods of approximately 18 months. However, extensions of program plans beyond the upcoming fiscal year are not included in the formal budget system.

Tribal leaders are uninformed regarding budget concepts and their ability to make changes.

Participants are given sketchy information (typically, a single base year dollar figure for a particular progam without a detailed breakdown).

Tribal participants have only a short time to make their decisions. A typical time span is 48 hours from initial presentation of information to final decision.

Band programs are determined by BIA and change from year to year. Reasons for banding are not explained to tribal leaders.

The current BIA budget is submitted to higher review levels without indicating the banded needs of an agency or tribe. The Bureau's budget is a combination of banded priorities and nonbanded central and area office programs. Justifications relate to programs but do not analyze agency or tribal input. Tribal needs and budget data visibility are stopped at the Bureau level through consolidation by program.

For example, in three United States Government reports, the Bureau's budget is deficient in agency or tribal input. The BIA budget justification contains only descriptive Bureau program costs narratives. The Federal budget summarizes programs by functional breakdowns. Its appendix details information by program activity and extends the analysis to include a budget presentation by object account classification.

Personnel

Almost every area of personnel management in the Bureau is inadequate.

Comprehensive studies on BIA staffing levels are not performed, resulting in either over- or under-staffing. In addition, personnel reductions do not follow a logical selection process. Observations on manpower utilization at sample BIA offices indicate that output is very low. However, effective manpower utilization does not appear to be of prime importance since defined quality/quantity output standards are nonexistent. Personnel ceilings are set arbitarily by OMB with no input from area, agency and tribal management. These ceilings are often circumvented by an excessive use of temporary employees.

The present emphasis on training is general in nature, narrow in scope, and unrelated to employee's jobs. As a result, many underdeveloped and underutilized employees operate marginally and mishandle their assignments. Bureau training activities need improvement at all levels, especially for management intern programs for Indians which have been practically nonexistent.

Indian preference has a profound effect on BIA personnel management. Congress intended that "the Indian service shall gradually become a service predominantly in the hands of educated, competent Indians." However, no one in 1934 realized just how gradual this process would be. Even now, 42 years later, many positions are virtually impossible to fill. Many non-Indians either leave BIA or are minimally motivated to perform because of Indian competition. The failure of Bureau personnel to understand Indian preference has led to inconsistent administration of the policy at all levels. The result is a significant reduction in BIA effectiveness. Internal mobility and flexibility also suffer because, in many instances, non-Indians cannot be transferred to new positions.

Employment classification is in a chaotic state. As a result, some classification authority has been reclaimed by the BIA central office. However, consistent job classification or reclassification policies are still nonexistent. Job categories are being altered to fit the applicant—being downgraded when a competent candidate is unavailable and raised when an administrator wants to provide a reward without justification. Administrative pressure challenges the integrity of the classification process. Because of a shortage of qualified classifiers and an exodus of those available to other Government agencies, classification actions are a long, time-consuming process.

BIA labor relations practices are also poor, both from the humanistic and managerial point of view. Management is often "autocractic" or "dictatorial." Employee input is not solicited and, if voluntered, remains unanswered. BIA managers and supervisors admit ignorance of employee relations practices. High personnel turnover often results, particularly in critical areas. This type of management leads to unionization, third-party intervention and inflexibility in personnel assignments.

Management Information

The current data processing function is incapable of providing the spectrum of data and reports needed by managers on a timely basis. In addition, many reports are inaccurate, making it necessary for agency personnel to maintain their own accounts. Although 35 different standards and/or procedures manuals are available or near completion, they are primarily for handling hardware and software at the division's data center. Consequently, a complete catalog of data and special reports material is unavailable. Personnel skills as well as various application systems are becoming obsolete.

A study on the replacement of obsolete hardware and addition of improved service and data handling capabilities is in progress. In addition, an interim equipment improvement proposal is being pursued.

This study on the replacement of obsolete hardware is now considered complete by the Division responsible for its implementation. However, the AIPRC has talked with Bureau central office, area, agency and especially tribal government staff regarding the proposal and have found the proposal was not developed by a comprehensive needs analysis. They feel the proposed project would not meet their needs, eliminate obsolete or duplicate reports, but would in fact add to their problems.

Communication of information is so slow that programs and employee morale suffer. Agency and tribal managers lack sufficient decision-related data and their requests for this pertinent information go unanswered. Information flow is slowed by various coordinators and liaison personnel who constitute bottlenecks to desired communication patterns especially at the area director level and data center.

No capacity exists for meeting special field requests or providing direct access from remote locations. Since manuals documenting capabilities and reports are inadequate, both system input and output are extremely poor.

Reports are not organized to provide information on an exception basis. Therefore, users must dig through piles of paper to locate problems. Because report accuracy is poor, they are not used. Agency and tribal managers maintain "cuff accounts" for reconciling and controlling activities. Inaccuracies are caused by insufficient knowledge on data input and submission.

Due to inadequate and unreliable measurement information, managers can do little to control people or programs. Data are used primarily for employee records and to provide reports requested by area or central offices. The information available simply documents past history for compilation into composite status reports.

This type of information cannot be used effectively to evaluate, manage and motivate people, make decisions or measure program quality. Even simple comparisons are not available for management control purposes. Insufficient standards and measurements are prime reasons for line manager, program and employee control problems.

There are no available data to provide the basis for an alternate course of action because of changing circumstances in the future. Thus, agency offices must exist on a day-to-day basis reacting to problems and situations as they arise. As a result, ongoing programs get farther behind and are inadequately implemented.

Both equipment and materials inventory systems are ineffective and wasteful. They are not completely automated because the division lacks the necessary capacity. Also, standards for controlling inventories and servicing equipment do not exist. Equipment listings are incomplete, causing supplies to disappear without sufficient documentation. Only a few of the 17 division reports sent to the agencies and tribes are useful due to insufficient understanding or inapplicability of the information in the reports. Although some manuals are available, they do not explain report interpretations effectively.

Area, agency, and tribal offices are starting to acquire data processing equipment because of inadequate service from the division. Recent data processing studies indicate the major problems are lack of needs analysis at agency and tribal levels, insufficient hardware capability and a shortage of qualified people.

Recommendations Based on the BIA Management Study

Estimated benefits from implementation of the following recommendations could amount to $123,072,000 annually and a one-time savings of $20,830,000. These benefits would accrue to the Indian tribes for programs and development in Indian country. Streamlining management organization and efficiency of the Bureau of Indian Affairs is a logical first step toward better administration of Indian policy. The second step is discussed in section IV of this chapter. The BIA management recommendations which follow here, should apply to the new Indian agency mentioned there as well.

A digest of recommendations follows.

DIGEST OF RECOMMENDATIONS[1]

Recommendations	Action required	Financial impact	Estimated amount
BUDGET PROCESS			
1. Establish a formal planning system within BIA and integrate it into the present budget process.	Executive		
2. Reorganize budgeting, planning and intergovernmental relations into 1 integrated organization.	do		
3. Stimulate Indian participation in the budget process	do		
4. Include all nonbanded area programs except trust funds in the agency budget formation process by fiscal 1979.	do	1-time cost	$50,000
5. Make the budget function responsible for variance analyses and performance reviews.	do		
6. Emphasize Indian participation and band analysis in the BIA budget review to the department, OMB, President and Congress.	do		
7. Establish annual project planning at area and agency levels for all continuing programs and monitor performance quarterly on a personal basis, altering the plan to reflect status changes.	do	Annual saving	250,000
PERSONNEL MANAGEMENT			
8. Strengthen Indian preference to improve BIA effectiveness while continuing to hire, train and upgrade Indians for bureau employment.	do		
9. Develop a human resources planning system using industrial engineering techniques to establish appropriate staffing levels and position requirements.	do	Annual saving 1-time cost	75,000,000 430,000
10. Develop an aggressive recruiting program to secure qualified or trainable Indians.	do	Annual cost 1-time cost	150,000 50,000
11. Reorganize the employment classification system to improve credibility.	do		
12. Improve BIA employee relations practices	do	1-time cost	100,000
13. Develop training programs to meet specific BIA requirements.	do	Annual cost 1-time cost	80,000 20,0000
14. Continue regular civil service evaluations and upgrade personnel-management quality through Department of the Interior project manager appointments.	do	Annual cost	42,000
MANAGEMENT INFORMATION			
15. Establish and install performance measurement standards	do	Annual saving	15,000,000
16. Initiate a program to improve and facilitate general communications between central office and field supervisors.	do		
17. Develop a concise statement on critical issues	do		
18. Improve the management by objectives programs.[3]	do		
19. Expedite the automatic data processing modernization study to insure completion by Jan. 1, 1977.[2]	do	Annual cost avoidance	10,000,000

See footnotes at end of table.

DIGEST OF RECOMMENDATIONS[1]—Continued

Recommendations	Action required	Financial impact	Estimated amount
20. Complete application analysis section of the modernization study by Oct. 1, 1976.[2]	do		
21. Add remote-access and interactive capabilities to reduce processing time and increase computer program development efficiency.	do		
22. Develop an inventory system for a comprehensive management system.	do	Annual saving	6,600,000
23. Develop standardized material and supply inventory systems.	do	do 1-time saving	5,000,000 20,000,000
Total			132,952,000

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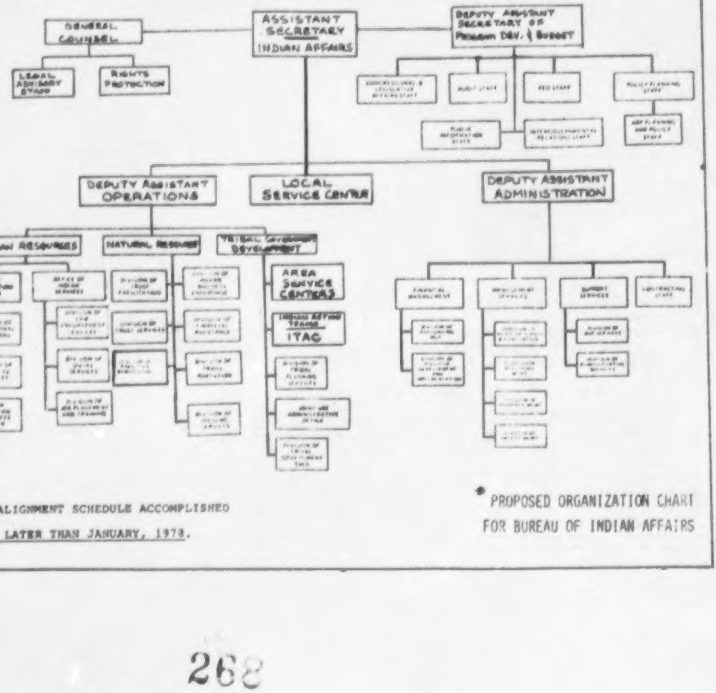
[1] Bureau of Indian Affairs Management Study, American Indian Policy Review Commission, pp. 45–46.
[2] Commission recommends a reevaluation of these 2 proposals by the Secretary.

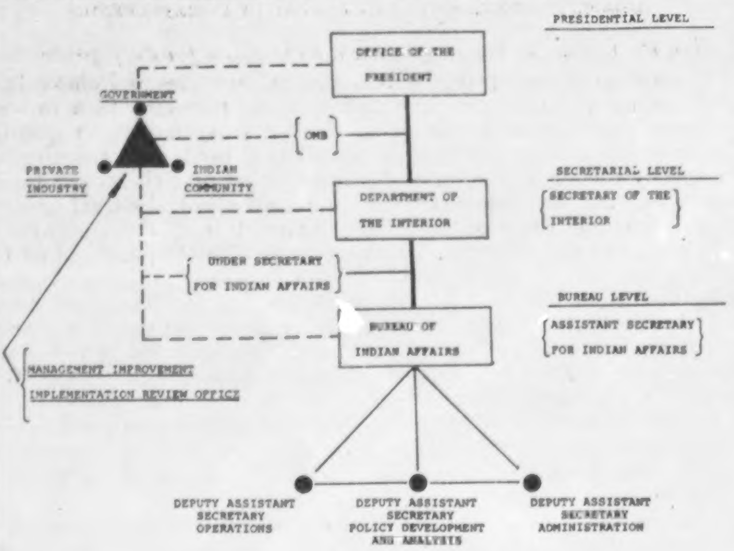
Senator James Abourezk, Chairman of the Indian Affairs Committee of the Senate, has stated that the savings would be transferred to Indian tribal programs at the local level. A more efficient BIA administration could provide the badly needed program dollars for Indian economic recovery. Tribes need funds for land acquisition, consolidation, natural resource development, and a new source of flexible budget coupled with increased sophistication in tribal planning and management capacities necessary to establish a viable economic climate.

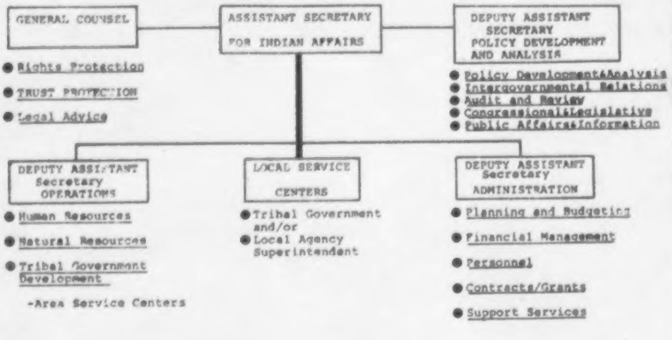
Indian administration can be vastly improved by a commitment by Congress and the executive branch to a process of improving the delivery of money and access to technical assistance. Badly needed budgetary flexibility can be obtained by eliminating the waste that has built up over the years.


GENERAL COUNSEL
ASSISTANT SECRETARY INDIAN AFFAIRS
DEPUTY ASSISTANT SECRETARY OF PROGRAM DEV. & BUDGET
LEGAL ADVISORY STAFF
RIGHTS PROTECTION
DEPUTY ASSISTANT OPERATIONS
LOCAL SERVICE CENTER
DEPUTY ASSISTANT ADMINISTRATION
HUMAN RESOURCES
NATURAL RESOURCES
TRIBAL GOVERNMENT DEVELOPMENT
AREA SERVICE CENTERS
ITAC

* REALIGNMENT SCHEDULE ACCOMPLISHED NO LATER THAN JANUARY, 1978.

* PROPOSED ORGANIZATION CHART FOR BUREAU OF INDIAN AFFAIRS


PRESIDENTIAL LEVEL
OFFICE OF THE PRESIDENT
GOVERNMENT
OMB
PRIVATE INDUSTRY
INDIAN COMMUNITY
SECRETARIAL LEVEL
DEPARTMENT OF THE INTERIOR
SECRETARY OF THE INTERIOR
UNDER SECRETARY FOR INDIAN AFFAIRS
BUREAU LEVEL
BUREAU OF INDIAN AFFAIRS
ASSISTANT SECRETARY FOR INDIAN AFFAIRS
MANAGEMENT IMPROVEMENT
IMPLEMENTATION REVIEW OFFICE
DEPUTY ASSISTANT SECRETARY OPERATIONS
DEPUTY ASSISTANT SECRETARY POLICY DEVELOPMENT AND ANALYSIS
DEPUTY ASSISTANT SECRETARY ADMINISTRATION


GENERAL COUNSEL
ASSISTANT SECRETARY FOR INDIAN AFFAIRS
DEPUTY ASSISTANT SECRETARY POLICY DEVELOPMENT AND ANALYSIS
Rights Protection
TRUST PROTECTION
Legal Advice
Policy Development&Analysis
Intergovernmental Relations
Audit and Review
Congressional&Legislative
Public Affairs&Information
DEPUTY ASSISTANT Secretary OPERATIONS
LOCAL SERVICE CENTERS
DEPUTY ASSISTANT Secretary ADMINISTRATION
Human Resources
Natural Resources
Tribal Government Development
-Area Service Centers
Tribal Government and/or
Local Agency Superintendent
Planning and Budgeting
Financial Management
Personnel
Contracts/Grants
Support Services

PROPOSED ORGANIZATION CHART
FOR BUREAU OF INDIAN AFFAIRS

UNSOLVED PROBLEMS IN THE BUREAU OF INDIAN AFFAIRS

Indian Preference in Employment: a Preference for Self-government

The notion of exempting certain Federal agencies and offices from civil service requirements and staffing them pursuant to a tailored personnel system is hardly unique in the U.S. Government. Frequently, Congress has recognized that the specialized needs and functions of an agency render it unsuitable for application of civil service hiring and promotion requirements. This has resulted in 42 Federal agencies or offices being fully or partially exempted from the employment restrictions of the Civil Service Commission. The Department of Defense alone has 301,000 noncivil service positions, and the Veterans Administration has over 34,000. Some Federal agencies have established entirely independent personnel systems to meet the unique needs of their mission or staffing requirements. This includes agencies such as the Energy Research and Development Administration, the Tennessee Valley Authority, the U.S. Postal Service, and others.

The reason most often given for authorizing these independent personnel systems is the flexibility they allow in recruiting, selecting, hiring, and promoting individuals with specialized skills uniquely valuable to the agency.[41]

The reasons for exempting these agencies apply equally as well to the present Bureau of Indian Affairs and to the proposed new Department of Indian Affairs. Furthermore, the Federal trust responsibility to American Indians and more than 140 years of Federal statutory law mandate a separate service in the Indian Service.[44]

But despite these factors, a separate Indian Career Service has never truly been considered by the executive branch. There is no firm management policy on Indian preference; [42] management support for the concept is inconsistent; and when Indian preference is followed in hiring practices, it is usually confined to the lower-level, nonmanagement positions. Thus, the percentage of Indian employees has remained virtually the same (57 percent) since 1951, and 65 percent of the Indian employees are GS–7 or below.[43]

At the present time, there are at least seven Federal statutes dating back as far as 1834 which provide for Federal employment preference for Indians within the Indian Service.[44] The purpose of these statutes, as variously expressed in the legislative histories, was "to give Indians a greater participation in their own self-government; to further the government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." [45]

The Indian employment preference statute principally relied upon today is section 12 of the Indian Reorganization Act of 1934 (IRA),[46] which was designed to correct the inadequacies of several earlier preference laws. The Congress realized that the Civil Service laws and a lack of technical training were the main stumbling blocks to getting Indians into their own Service. Under the pre-IRA laws, Indians were forced to compete with non-Indians under Civil Service standards while at the same time the Indians were denied or did not have access to education and training and were accorded no merit for the life knowledge and skill obtained outside the standards of formal education.

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[41] *See* Indian preference exhibits, final report of Task Force Nine, volume II.

[42] For a thorough explanation of all agencies with respect to the civil service system, *see*: U.S. Senate, Committee on Post Office and Civil Service, Statutory Exceptions to the Competitive Service, 93d Cong., 1st sess. 1973.

[43] Ibid.

[44] 25 U.S.C., sec. 45 (1970); 25 U.S.C., sec. 46 (1970); 25 U.S.C., sec. 348 (1970); 25 U.S.C., sec. 44 (1970); 25 U.S.C, sec 274 (1970); 25 U.S.C., sec. 47 (1970); 25 U.S.C., sec. 472 (1970).

[45] *Morton* v. *Mancari*, 417 U.S. 515, 541, 542, (1974) (footnotes omitted).

[46] 25 U.S.C. sec. 461 et seq. (1970).

Section 12 of the IRA sought to correct this situation by providing:

> The Secretary of the Interior *is directed* to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, *without regard to civil service laws*, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians *shall hereafter have the preference to appointment to vacancies in any such positions.* [Emphasis added.] [47]

The IRA thus clearly intended to make the civil service laws inapplicable in the appointment of Indians to the Indian Service and to provide for creation of a special personnel system designed to insure that Indians themselves administer government Indian affairs activities. To assist in implementing this plan, section 11 of the IRA also provided that adequate training and recruitment of Indians be provided.[48] As Representative Howard, the sponsor of the IRA in the House, stated to the Congress in 1934:

> Section 13 directs the Secretary of the Interior to establish the necessary standards of health, age, character, experience, knowledge and ability for Indian eligibles and to appoint them without regard to civil service laws; and it gives to such Indians a preference right to any future vacancy. This provision in no wise signifies a disregard of the true merit system but it adapts the merit system to Indian temperament, training and capacity. Provision for vocational training and higher education will permit the building of an entirely competent Indian personnel.[49]

Senator Wheeler, chairman of the Senate Committee on Indian Affairs and sponsor of the IRA in the Senate, stated in 1934 why such a unique career system for Indians in the Indian Service is justifiable:

> It (the Indian Service) is an entirely different service from anything else in the United States, because these Indians own this property. It belongs to them. What the policy of this government is and what it should be is to teach these Indians to manage their own property and the civil service has worked very poorly so far as the Indian Service is concerned * * *.[50]

In a recent case, the U.S. Supreme Court lent further justification for Indian employment preference by stating that:

> The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an inhabitant of that State for which he shall be chose," Art. I, Sec. 3, cl. 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent groups in staffing its projects, all of which either directly or indirectly affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasisovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. Since there is no other group of people favored in this manner, the legal status of the BIA is truly sui generis." [51]

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[47] 25 U.S.C. sec. 472 (1970).
[48] 25 U.S.C. sec. 471 (1970).
[49] 78 Cong. Rec. 11731 (1934).
[50] 78 Cong. Rec. 11123–11125 (1934).
[51] *Morton* v. *Mancari,* 417 U.S. 535, 545 (1974).

Thus, the Congress in 1934 and the Supreme Court in 1974 both viewed the Indian Service as unique and Indian employment preference in the Service as a justified and logical step to further Federal policy in Indian affairs.

In the course of a hundred years there have been at least seven statutory attempts to provide for Indian preference in employment within the Indian Service (BIA and IHS).[52] The present condition of personnel administration within the Bureau of Indian Affairs and Indian Health Service is an indication that Indians can expect no better treatment in the near future without the intervention of Congress or top direction from the executive branch.

The present conditions do not generally result in a sufficient supply of good candidates for jobs, for Indians or non-Indians. A lack of procedural and administrative leadership has left all employees to struggle with the complex issues without the benefit of Bureauwide policy direction and laws that were meant to assist them.

A MANAGEMENT AND PUBLIC AWARENESS PROBLEM OF THE BUREAU

Hidden Regulations

The Bureau of Indian Affairs (BIA) regulates and controls its relations with the service population, primary and subsidiary offices (central, area, etc.), other agencies, and individuals and entities in both the public and private sectors largely through the BIA manual. Thus, the quality, accuracy, and efficient maintenance of the manual system becomes essential if the Bureau is to fulfill its responsibilities.

This manual system consists of some 42 titles and 52 supplements. Printed in looseleaf binder form, the manuals fill a 10-foot long bookshelf. Of these 42 titles, approximately 17 relate to internal agency administrative matters. The remaining 25 involve subject areas which regulate and affect the rights of the Indian tribes and Indian people.

The BIA manual as it presently exists is a confusing, outdated, antiquated, often contradictory, and generally inefficient compilation of policy and procedure ranging from the old (80 BIAM) to the absolutely unfathomable (82 BIAM). Portions of the manual system are in violation of the publication requirements of the Administrative Procedure Act (APA), contrary to congressional intent, relevant statutes, judicial decisions, or agency regulations, and in such a state of disorganization as to be of limited utility to agency personnel.

There are numerous regulatory provisions contained in the manual which affect the substantive rights of Indians. In many cases, these agency regulations have not been published for comment in the Federal Register and subsequently codified in the Code of Federal Regulations (CFR) as required by the Administrative Procedures Act (APA). The most flagrant example of this is 82 IAM, containing some 200–300 pages of eligibility criteria and guidelines regarding the Bureau's Employment Assistance Program. Very little, if any, of this title has been published. Abrogation of such procedures results in the denial of benefits through illegal eligibility requirements and other criteria being improperly imposed.

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[52] BIA Management Study, final report of Task Force Three (GAO, 1976), p. 103.

Mechanically confusing, the manual contains both Indian Affairs Manual and Bureau of Indian Affairs Manual volumes. The older volume was to be totally replaced by new material over 2 years. Very little replacement has in fact been accomplished. The proliferation of old titles still in use further exemplifies the outdated condition of the manual system. Numerous references contain vague statements advising that an appropriate part will be issued "later." Some of these initial references are themselves over 6 years old.

As the primary tool for all BIA personnel to ascertain and apply Bureau policy regarding such vital areas as delivery of services and protection of land, timber, water, and mineral resources, it is imperative that the manual be made more responsive to the needs of its users while at the same time effectively accomplishing its purposes.

The manual system must be comprehensive, comprehensible, and legally correct in order for it to be effectively utilized by agency personnel. Until this is accomplished, irreparable harm is being done to Indian people.

In conclusion, a careful revision of the present service delivery system of the Bureau of Indian Affairs must be undertaken. Such a revision must encompass not only the perspective of Bureau employees as to the inadequacies in the delivery of services, but most importantly, tribes must have the opportunity to express their views as to how the service delivery system can be revised to better meet tribal needs. This revision plan is a necessary prerequisite to the establishment of service delivery systems in a new independent Indian agency. Such regulations should then be published in the Federal Register to allow for comment by interested persons.

PROBLEMS WITH THE BUREAU OF INDIAN AFFAIRS BUDGET

One of the most important elements in any budget formulation process is the relation of a budget to the total physical and financial needs of the population to be served. Particularly, the Bureau of Indian Affairs budget should be responsive to Indian planning and program priorities at the local level. However, the organizational structure of the Bureau separates the functions of the Financial Management staff responsible for budget formulation from the functions of the Policy Planning staff responsible for planning. This separation of functions also exists in the area and agency offices, and thus the coordination between budget and planning processes critical to responding to tribal needs is lacking. As the BIA Management Study points out,

> Formalized communications do not exist between the Policy Planning Staff and areas, agencies and tribes. The relationship between the central office and area PPE budget function is one of downward procedural information and upward consolidation. The same basic budgeting relationship exists between the area and the agency. However, communications between the agency and the tribe occur during the budget planning phase but not during the budget monitoring phase.[83]

In an attempt to align the budget with tribally established priorities, the band analysis system of budget formulation was created in the

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[83] U.S. House of Representatives, 1977 appropriations hearings—Department of the Interior, part 6, p. 708.

Bureau. The process supposedly allows tribes to indicate spending preferences at varying levels of total funding derived from percentages of the previous year's funding. However, upon closer scrutiny of banded and nonbanded program outlays, it can be seen that more than half of the budget is not determined by the band analysis. Since there are several tribes under one agency, tribal conflicts are created. Tribes have no input as to which Bureau programs are banded or nonbanded, thus Bureau attempts to respond to tribally established funding priorities are meaningless.

> Indeed, the BIA budget formulation process is structured in such a way as to be more responsive to the constraints of the budget processes and appropriations procedures of the Department in which it is located, and OMB, rather than the tribal needs it is legally mandated to serve.[54]

A proposed budget formulation process for the Bureau of Indian Affairs as part of a larger proposed Federal-Indian budget has been a major endeavor of this Commission. The proposed budget process provides for a total assessment of tribal needs and the development of long range tribal plans to meet the needs identified. Upon completion of a needs assessment and development of a tribal plan, the tribe would then enter into negotiations with the Bureau of Indian Affairs to determine those Bureau programs which would best respond to tribally specified needs and long-range plans. Following this, the tribe would then proceed to identify those Federal domestic assistance programs which target moneys and services to those areas of need not addressed by available Bureau programs. Finally, a total tribal budget would be submitted to Congress as a part of the total Federal-Indian budget. Costs of Bureau of administration would be entered separately, so that at all times, all parties to the budget process would be able to identify the tribal budget as distinct from the Bureau budget. Bureau requests for appropriations would then be based on the tribal needs.[55]

The 1934 Indian Reorganization Act required that the Secretary of the Interior advise the tribes of the amount of money requested for their benefit. This provision has never been properly carried out. Also, the 1934 Act contemplated that should the tribal council disagree with the Secretarial submissions, the differences should be made known to the Congress. In the 1976 oversight hearings of the House Appropriations Subcommittee, Chairman Yates advised [56] the Bureau of Indian Affairs that "Our Committee considered itself to be as important as OMB and the Department of the Interior in being advised of the amount of money necessary to carry on BIA's program adequately." Out of this hearing, the committee authorized an investigation, which was highly critical of the Bureau of Indian Affairs administration of its educational facilities. This report is dated December 1976 and states:

> In the opinion of the Investigative Staff, the Indian Self-determination Education Assistance Act (Public Law 93-638) is one of the most important legislative acts dealing with the Indian people. It is however, complex and comprehensive, and the achievement of the goals envisioned by Congress may require a

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[54] Ibid.
[55] See ch. 8, for an expanded discussion.
[56] See final report of Task Force Six (AIPRC, GPO, 1976).

> greater understanding on the part of the BIA and Indian people and a great deal of patience on the part of tribes in obtaining the full benefits intended.
>
> Self-determination means that tribes are entitled to establish their own priorities and goals without Federal domination. Under this Act, the Federal Government is committed to accept and support tribal government judgments based on the needs and goals of their people. The Act seeks to establish a new direction for Federal Indian people to direct their own destinies, while at the same time preserving their special rights and trustee status with the Federal Government.

The new (President Carter's) administration beginning in 1977 has expressed a preference for a zero-based budget, and this Commission recommends the same to begin at the tribal level. Most tribes have long-range plans that this predetermined annual needs for funding. Such a system could be initiated rather quickly to meet legal requirments and the desires of Congress to learn the truth of the actual needs of Indian tribes and people.

CONTINUING PROBLEMS AT "THE OTHER" MAJOR INDIAN SERVICE

The Indian Health Service

The responsibility for Indian health was transferred from the Bureau of Indian Affairs to the Department of Health, Education, and Welfare in 1955. At that time, the Indian Health Service was created under Public Health Service and the Health Services Administration of that Department, and was designed to provide health care services to Indian people in areas where there were no existing health care facilities. The main advantage seen in such a transfer was the availability of doctors serving in the Public Health Service in lieu of the 2 year military obligation resulting from draft deferments for medical training. Almost immediately, health care services to Indian people improved as the Indian Health Service budget was increased and medical personnel were assigned to Indian Health Service installations. Still, there was an overwhelming backlog of Indian people needing health care services, and environmental conditions on many reservations continued disease-breeding at astonishing rates. Today, even though significant improvements in Indian health have been witnessed, Indian Health Service officials estimate that if no new cases were undertaken by IHS, it would take approximately 50 years to treat the backlog of Indian people needing medical treatment. Indian Health Service seeks to respond to this need by providing funds for contract health care from other health care professionals and hospital facilities. Gradually, the role of Indian Health Service has evolved to become that of a health care provider of last resort. Funding and staffing of health care facilities are severely below national standards and recommended doctor-patient ratios. Thus, Indian Health Service must ask that Indian people exhaust all other possible sources of health care services before turning to Indian Health Service for treatment. As a general rule, however, other health care providers are not aware of the evolving role of IHS, and as a result, refuse treatment to Indian people on the grounds that provision of health care services to Indian people is the sole responsibility of the Indian Health Service. Thus, the delivery of health care services to Indian people is at best fragmented, and lacks a formalized system for assuring that the health needs of Indian people will be met.

a. Organizational Structure

The delivery system of health care services in the Indian Health Service consists of a central office in Rockville, Md., 4 program offices, 8 area offices, and 88 service units. The central office is responsible for setting IHS policy, the program offices conduct research and development, the area offices provide technical assistance and program evaluation, while the service units are responsible for providing direct medical care and locating other health providers for contract health care. The delivery system is plagued by problems of poor management, lack of leadership, poor communication between area offices and service units, and a lack of policy guidance.[57]

The quality and variety of health care that a service unit can render is severely restricted by the service unit budget, which has always been significantly inadequate to respond to the health care needs of Indian people it is supposed to serve. Management of the service unit is the responsibility of a physician who spends his first year in IHS with a full clinical caseload, and his second year managing the service unit. Many physicians express their dissatisfaction with this arrangement—many feel that they do not have sufficient background in administration to enable them to be effective service unit managers.[58] Second, depending upon the backlog of cases, some physicians must maintain their full clinical caseload as well as assuming the responsibility for service unit management. Often, this situation precludes evaluation of total health needs and the establishment of treatment priorities. Inadequate staffing and insufficient funding require that emergency treatment receive first priority, and in most cases, that preventative treatment be abandoned.

A recent development in the organizational structure of the Indian Health Service has been a change in the role of the area offices which now serve as technical assistance facilities for the service unit. Resistance to this reorganization is evidenced by the lack of cooperation between service units, and area offices. Communication and assistance generally is a function of personal relationships rather than IHS policy facilitating the flow of information. Service unit personnel view the area offices as just another layer of bureaucracy which obstructs communication and accessibility to central office decision-making.[59]

The service delivery system of Indian Health Service needs major improvement in management procedures, communication among the various elements of the service delivery system, and overall policy guidance coupled with adequate funding in order to realize the goal of bringing the health status of Indian people up to parity with that of the general population.

b. Indian Health Service Budget

The most severe problem faced by Indians in seeking to obtain medical treatment is a result of the budget formulation process of Indian

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[57] The accounting system of the Indian Health Service is structured in such a way as to preclude any tracking of the actual percentage of a dollar reaching the service unit level, or more importantly, precludes the identification of that portion of each dollar that actually goes to treatment.

[58] Task Force Six, Health Task Force final report to American Indian Policy Review Commission, July, 1976.

[59] Ibid.

Health Service. IHS receives a fixed allocation each year, a percentage of the departmentwide budget appropriated to the Department of Health, Education, and Welfare. This allocation bears little relation to the needs witnessed at the service unit level or those identified by Indian people. Yearly allocations are whittled away by central office administrative costs and area office administrative costs, with the result that only a small portion of the dollar allocated gets down to the service unit level.[60] Even then, a service unit may receive a portion of the funds allocated to it in the form of X-ray machines or other equipment which it may not need, while critical needs for increased staffing go unmet. Moreover, the funds remaining after the central and area offices have extracted their administrative costs, drastically reduce the quality and variety of health care a service unit can provide. Often, because of financial constraints a service unit is unable to provide anything other than emergency treatment. Health maintenance and disease prevention are nonexistent in service units with such budget constraints. The service unit must continually redefine the population eligible for IHS services given scarce resources that, preclude the provision of health care services to those with the greatest need. The result is that Indian people are denied service by their own health service, only to be sent "down the road" to be refused services from discriminatory health care providers.

In order to adequately respond to the health care needs of Indian people, the budget formulation process of the Indian Health Service must be revised in accordance with the principles outlined in the proposed Federal-Indian budget.[61] Such a process would entail Indian identification of the total health needs of each Indian community (reservation and urban) and development of a long-range plan to meet those needs. The result of the total health needs analysis and long-range plan would then be submitted to the service unit, whereupon service unit personnel would work with tribal representatives to create a service unit budget based on tribally identified health needs. The budget would specify program costs, treatment costs, equipment costs, central and area office operating expenses separately, so that at all times, all parties to the budget formulation process could identify Indian Health needs assessment data as distinct from IHS administrative costs. The Indian Health Service budget requests would then be based on the health needs of the Indian community which it is mandated to serve.

The statistics on lack of health care gathered to justify passage of Indian Health Care Improvement Act (Public Law 94–437) indicate the ratio of professional health care employees to Indian population is much lower than the U.S. as a whole.[62] The low percentage of facilities qualifying for accreditation by normal health standards and the particular conditions of comparison on any element actually reflects admission of inadequate conditions being clearly expressed to Congress. Public Law 94–437 requires funds appropriate to accelerate health care to Indians must be over and above that appropriated for each year's "normal operational requirements budget." It is therefore questionable that any funds could be used unless the regular appropriations bring the low percentage ratios up to par on a national level. If IHS does not bring the ratio of professional employees up to U.S. standards, the intent of 437 will not be achieved.

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[60] The accounting system of IHS is structured in such a way as to preclude any tracking of the actual percentage of a dollar reaching the service unit level, or more importantly, precludes the identification of that portion of each dollar that goes for treatment.

[61] See action on a separate department in this chapter.

[62] Indian Health Care Improvement Act—House of Representatives Report 94–1026, part 1, Apr. 9, 1976.

Indirect information by the evidence indicates that funds appropriated to IHS for the Indian Self-Determination and Education Assistance Act (Public Law 93–638 purposes transferring administrative responsibility to tribes) is actually being used for employee pay raises. This is supported by the Indian Health Service indications that they would be able to absorb the pay raises in the current appropriation amounts. This raises the question of whether the Executive leadership is even interested in correcting the deficiencies for which the health legislation was passed.

A management study of Indian Health Service is necessary and the indications are that Indian Health Service should be withdrawn from the Department of Health, Education, and Welfare and join other Indian activities in a new department or agency for major Indian affairs activities as a part of the trust responsibility.

A PROGRAM FOR THE FUTURE OF INDIAN ADMINISTRATION

CONSOLIDATION OF INDIAN PROGRAMS IN ONE DEPARTMENT

Since the founding of this Nation, there have been proposals advanced for the development of a separate department or independent agency. Indeed, original plans were advanced in colonial times for the establishment of not only a separate department, but even a 14th State.

Since the transfer of the Bureau of Indian Affairs from the War Department to the Department of the Interior, the question has been raised: "Where should the Bureau of Indian Affairs be located?" Another question often asked is: "How should it be organized?" Responses have ranged from the 19th century urging to return it to the direction of the War Department, the recommendation that "* * * Indian affairs be committed to an independent bureau or department"[63] and the 20th century recommendations that it should be "abolished" or later transferred to the Department of the Interior. As changes in the structure and location of the Bureau of Indian Affairs were considered during the early part of this century, Indian tribes repeatedly asserted their rights to consultation prior to any administrative or legislative modifications.

Apart from the Board of Indian Commissioners, the first major influence that tribal governments had on Bureau structure came during congressional hearings on the administration-proposed Indian Reorganization Act.[64] Indian efforts to influence structure continued sporadically through the remainder of the 1940's and into the next decade. But, not until 1961 through the American Indian Chicago conference did Indians establish a comprehensive position on the character and structure of Federal Indian administration.[65] The threat of termination had the ironic effect of binding tribes together. Indian resolve was mirrored in the remarkable document produced by that conference: "The Declaration of Indian Purpose." [66] The Declaration began:

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[63] Report of Commissioner of Indian Affairs, 1868, p. 48. The Please Commission appointed by Act of July 20, 1867, 15 Stat. 17, made their recommendation to the Commissioner on November 18, 1868, but in a supplementary report (Oct. 9, 1828) urged transfer to the War Department.

[64] Act of July 15, 1870, sec. 3, 16 Stat. 355. *See:* Schmeckebier, pp. 26–27.

> We believe in the inherent right of all people to retain spiritual and cultural values, and that the free exercise of these values is necessary to the normal development of any people.[67]

Wide ranging proposals and recommendations were offered for a major overhaul of Federal Indian affairs administration and policy.

While the conference urged that area offices be abolished and that local agencies be given "broader exercise of responsibility and authority to act" as had their predecessors, the Declaration of Indian Purpose urged that certain principles guide the structuring of the Bureau of Indian affairs. The conference declared:

> That basic principle involves the desire on the part of Indians to participate in developing their own programs with help and guidance as needed and requested, from a local decentralized technical and adminstrative staff, preferably located conveniently to the people it serves. * * * The Indians as responsible individual citizens, as responsible tribal representatives, and as responsible tribal councils, want to participate, want to contribute to their own personal and tribal improvements and want to cooperate with their government on how best to resolve the many problems in a businesslike, efficient, and economical manner as rapidly as possible.

In the ensuing years and right up to this date Indian tribes and people have repeatedly requested that their special status be recognized and institutionalized in the form of a separate Indian Department or independent agency. The National Congress of American Indians, the National Tribal Chairmen's Association, the Affiliated Tribes of the Northwest Indians and other intertribal groups have all adopted resolutions requesting a separate department or agency.

By 1974, the National Congress of American Indians unanimously endorsed a position paper and "Proposal for Readjustment of Indian Affairs" [68] which recommended "the establishment of independent Federal governmental machinery to replace the Bureau of Indian Affairs". Contained in the "American Indian Declaration of Sovereignty" which is attached to the NCAI proposal in this urging:

> Establish a single, independent, federal governmental instrumentality with concurrence of the majority of the recognized aboriginal American Indian tribes and nations, in order to implement and guarantee the treaty responsibilities and trust obligations of the United States of America under Article Six of the Constitution of said nation.[69]

The National Tribal Chairmen's Association took a similar position in support of a separate Indian agency in the summer of 1975.[70]

Since these formal organizational statements were publicly announced, Indian tribes and other organizations have announced their support for various forms of a new structure of the BIA as a separate agency. Common among these various proposals is the separation of Indian affairs from the Department of the Interior. Similary, support for separation has been conditioned on full participation of Indian nations and tribes in the planning and development of the new agency.

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[65] Fifty-eight tribes representing 146,194 persons supporting the bill while 13 tribes representing 15,213 persons requesting more time for consideration or opposing it.

[66] American Indian Chicago Conference, Declaration of Indian Purpose, June 10–13, 1961 (Appendix D).

[67] Ibid., p. 45.

[68] NCAI Convention, San Diego, Calif., Oct. 24, 1974.

[69] Ibid., "American Indian Declaration of Sovereignty," part C.

[70] San Antonio News, September 1975.

In testimony presented to the American Indian Policy Review Commission on behalf of the Creek Nation, the following was recommended:

> * * * Indian affairs are not solely a judicial nor a legislative duty of the government, nor are they an exclusively Executive duty. On the other hand, Indian affairs are constituted by governmental duties which are simultaneously quasi-executive, quasi-legislative, and quasi-judicial. There is only one form of governmental organization of powers which embodies these three types of power simultaneously: independent commissions and agencies. * * *
>
> Therefore, I strongly recommend that Indian affairs be assigned to an independent commissions. Only this assignment of Federal power will alleviate the present confusion of Indian affairs with the Executive Branch.[71]

What may have been a negotiated political consideration prior and following the Revolution has become a desirable administrative and program alternative in the last 17 years. It is also motivated by Indian tribes desiring less Federal administration and a more direct method of receiving appropriations for tribal projects as well as a wish for relief from a compounded and fractionated conflict of interest.

Federal funds could be consolidated and provided more directly with a reduced administrative cost assessed by various Federal agencies.

Some of the principal reasons for the establishment of a separate department or independent agency are:

To reaffirm the separate and unique status by providing a Department which can effectively administer the trust.

To improve the delivery ratio of funds to Indian tribes.

To coordinate various programs more effectively by delegating that responsibility to one department.

To remove conflict of interest partially by consolidating the authorities of the United States into one prime agent for the trustee.

To provide a more direct access by Indian tribes.

To permit Indian tribes utilizing comprehensive planning to participate in a budget system which encourages tribal participation and priorities.

To permit Congress and the executive branch to effectively monitor and evaluate Indian administration and programs.

A SEPARATE DEPARTMENT

The best answer to many problems in Indian administration appears to be to create a separate Indian department or agency with oversight and jurisdiction and full legislative powers under a standing or select committee on Indian affairs. This (the separate Indian Department) would be accomplished by removing the Bureau of Indian Affairs from the Department of the Interior and subsequently having that agency which would administer the majority of Federal program dollars appropriated for Indians.

---

[71] Glenn Moore and Robert Trapp, Creek Nation, AIPRC hearing, May 8-9, 1976, Denver, Colo.

It should be emphasized that in transition the BIA would have to be streamlined and the Secretary of the Interior would have to assume the responsibility of planning the change. For the benefit of those who are BIA enemies, it must be pointed out that there is no other way to effectively transfer responsibilities to an independent Department or agency without the Bureau of Indian Affairs providing the base and core of the new "super" agency. The only other method to initiate the administration of a separate agency would be to run a parallel Department to the BIA which would duplicate administration. That does not appear to be feasible and Congress would probably be disinclined to duplicate appropriations for the same purpose.

The role of the Interior Department in the transition period prior to the enactment of legislation creating such a department or agency would be to prepare itself at the direction of the Secretary of the Interior and proposed Assistant Secretary of Indian Affairs to accomplish administratively many of the actions necessary to make it independent. Without regard to the establishment of a separate Department a complete inhouse overhaul of Indian Affairs is badly needed to provide an efficient delivery of budget and services as well as to administratively remove departmental conflict of interest. For instance, the Commissioner of Indian Affairs should be given Assistant Secretary status and the Associate Solicitor of Indian Affairs should be established as the General Counsel of the BIA.

The independent department or agency would be empowered to directly administer or coordinate all the activities and responsibilities of the executive branch related to Indian tribes and their members. This new department, in addition to coordination would be the principal administrator of a tribal budget system which would be consolidated in a manner which would advise Congress of the total needs, priorities, planned projects and proposed budgets for all Federal prgorams—programs possibly not administered by this department or agency would still be affected by its budgetary requirements and priorities. The legislation establishing this department or agency would contain certain elements as follows:

a. Provisions for tribal and organizational freedom.

b. A legal department operating independently of the Justice Department.

c. An Indian career service, independent of the civil service organization.

d. A program and budgeting system possibly independent of the Office of Management and Budget.

e. A decentralized program and budget development process, eliminating the present three-tiered organization.

f. Provisions for assuring maximum local control.

g. Provisions for delivery funds, assistance and programs directly.

h. A substantial decrease in administrative cost.

i. Additional program funds available for tribes.

A separate agency would consolidate programs from Federal departments which are a part of a separately established Indian service structure which exists because of the unique status of Indian tribes.

These programs were once almost solely within the Bureau of Indian Affairs and the Department of the Interior, but since the separation of Indian Health Service and establishment of the Office of Indian Education in HEW, administration has become complicated if not nonexistent.

The programs which might properly belong in a separate Indian structure are listed by agency and department as follows:

Agency or office	*Department*
Prime consideration	
Bureau of Indian Affairs	Interior.
Associate Solicitor for Indian Affairs	Do.
Portions of Lands Division	Justice.
Indian Health Service	HEW.
Office of Indian Education	Do.
Secondary consideration	
Office of Native American Programs	HEW.
Indian desk of economic development administration	Commerce.
Indian desk	Agriculture.

This is not a total list. The feasibility of which functions and offices should be transferred and whether by legislation or Executive order would have to be examined by the executive branch and Congress jointly with the Secretary of the Interior in the lead role.

INTERIOR DEPARTMENT TRANSITION

Until such time as a new department or independent agency is created, the Department of the Interior should consider administratively accomplishing certain tasks directly under the supervision of the Secretary or his delegate. While a proposed Assistant Secretary should provide the leadership, the Interior Department should not make the mistake of relying on the BIA to supervise its own management reforms. The alternative proposed is as follows:

1. Institute changes necessary to carry out the recommendations of the BIA Management Review conducted by the AIPRC, and endorsed in this report.
2. Administratively upgrade the Commissioner of Indian Affairs to an Assistant Secretary for Indian Affairs within the Department of the Interior.
3. Devise a BIA budget system which adequately expresses Indian needs and which provides for preparation of long-range plans by the tribes. Such a system should be separately accounted for within Interior Department by a delegate from the Office of the Assistant Secretary in charge of Program Policy and Budget.
4. Administratively remove the Associate Solicitor's Office of Indian Affairs from the Interior Solicitor's Office and create an Office of the General Counsel in the Bureau of Indian Affairs.
5. Remove the three-tiered management structure of the Bureau of Indian Affairs by having its 90 agencies reporting and negotiating directly with the Washington, D.C., office. The practice of having 12 BIA area offices supervising and administering over an average of 9 agency offices needs to be evaluated along with their purposes and objectives.

6. Require the Bureau of Indian Affairs to prepare an annual report which will consist of a report on programs, appropriate data, program evaluation results, and fiscal accounting reports. This report should be made available to Congress, appropriate levels of the executive branch, as well as the Indian tribes which the BIA serves.

7. Consider the establishment of a model technical assistance and administrative support facility in Denver, Colo., which would run parallel to existing BIA area offices without interfering with the daily operations of the field offices of the BIA. This office would provide technical assistance, contract administration, and management support to tribes on a project basis. This model technical assistance center could also serve as a test model for a multiagency service facility which could test the operational feasibility and effectiveness of an independent department or independent agency.

The personnel could be assigned from other agencies also working on Indian reservations. Staff could also be assigned through the Intergovernmental Personnel Act and funding flexibility could be provided for by assigning this facility with the main field contracting functions as well as the responsibility for the technical assistance and training related to management and contracting. Grants and contracts could be monitored and evaluated from this facility which is very accessible to "Indian Country."

BIA TRANSITION

The Bureau of Indian Affairs will play a very important role in any organizational changes in the Executive branch as well as Indian Affairs' adjustments undertaken by the Secretary of the Interior within the Department. The new Assistant Secretary will play a lead role in assessing the feasibility and the degree of change necessary to develop a plan for a separate department or independent agency.

Whether the BIA is removed from the Interior Department or not, it is still imperative that the Secretary of the Interior internally provide for tribal relief from the Department's conflict of interest problems. Any study should have implementation provisions built into it, thereby making a fundamental commitment to embark on a process of changing the Bureau of Indian Affairs from a management to a service agency. This commitment could spare Indian tribes the time and expense of a 77th study of the Bureau of Indian Affairs in 27 years.

The Commission recommends a process which would involve the President's Office, the Office of Management and Budget, and the Secretary of the Interior. The Secretary should serve as the principal coordinator in the executive branch.

It is, therefore, the sense of the Commission that the BIA can be more effectively reformed for efficiency by a separate operational planning, implementation, and review unit which would work directly between the Secretary of the Interior and the Assistant Secretary of Indian Affairs.

In summary, the transition recommendations to the Interior Department would be based on three premises:

That the executive branch will seriously consider submitting a plan for an independent agency or department of Indian affairs.

That an implementation of the management recommendations for the Bureau of Indian Affairs is a necessary first step in a process for a change.

That the Secretary of Interior consider the establishment of a "Management Improvement Review Office" reporting to the Secretary which would provide early assessments for future planning as well as implementing badly needed improvements in the present Bureau operations.

The following steps are recommended as an alternative approach to a transition administration for the Bureau of Indian Affairs. All studies conducted should initiate action and review.

1. Establish a Management Improvement Review Office to plan, organize, and supervise the implementation of recommendations to improve the Bureau of Indian Affairs, while guaranteeing the uninterrupted flow of essential services to the Indian people.

2. The process of implementing recommendations should provide for tribal participation within BIA areas to assure resolution of specific organizational and procedural problems identified by Indian tribes, such activities implemented by a predetermined schedule.

3. The plan must include a management information system keyed to the needs of Indian tribes for their use in making local policy and program decisions, as well as for providing an adequate statistical data base for national objectives. The materials provided should allow common access to the Federal Government and the Tribal Governments in order to promote deliberations on equally beneficial terms.

4. The plan must include:

(a) A budget system which allows tribal programs and priority needs to reach congressional committees in spite of OMB restrictions or ceilings.

(b) A personnel system which provides for developing mission statements, position descriptions, qualifications, and a recruitment program to encourage qualified Indians to apply. This could be the first step of instituting a new "Indian Career Service" discussed elsewhere in this report.

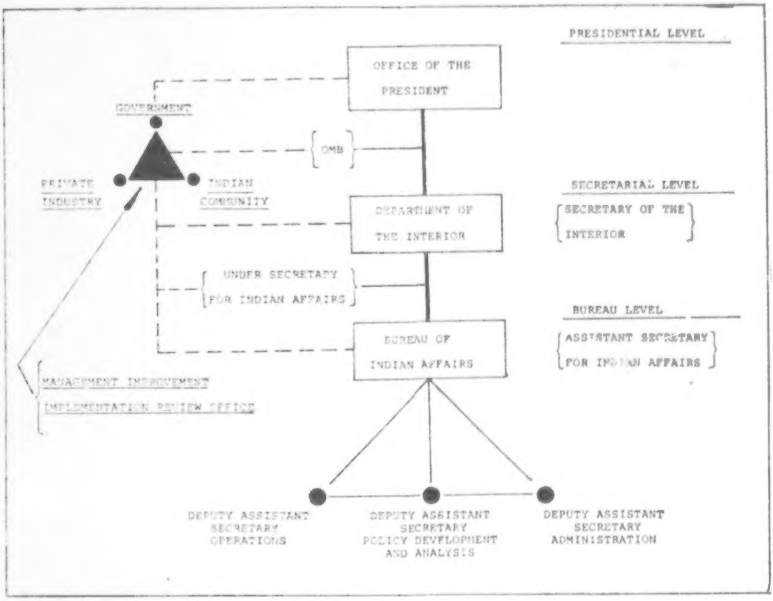
(c) An accounting system to provide a basis for analysis between congressional appropriations and actual fund usage, together with evaluations as to progress and accomplishments toward established tribal goals.

(d) A system of publishing current tables of organization, delegations of authorities, policy and procedural guidelines, and a method of keeping tribes up to date an operational rules and regulations involved in Bureau of Indian Affairs administration.

5. Implementation of organizational changes, administrative changes, and certain procedural changes requires reevaluation of central office activities, including the field extensions of the central office; area office activities, including special multitribal school and special office activities now under area offices; and agency offices where serving multitribal activities. The latter to determine the need for reducing multitribal agencies by increasing single or dual agency offices to give greater emphasis on local decision making powers at the tribal level.

6. The Management Improvement Review Office should review and cooperate with the executive branch in planning for reorganization of the executive branch as proposed by the President, in order to have an opportunity to clarify the trust responsibility and to prevent any intended or unintended diminishment of trust relations between the Indian people and the Federal Government.

7. The Management Improvement Review Office should review and cooperate with a Special Action Office of the President if and when any work is done to establish a new department or separate agency for Indian Affairs. See other section of this chapter regarding "A separate department."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OFFICE OF THE PRESIDENT
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SECRETARY OF THE INTERIOR
UNDER SECRETARY FOR INDIAN AFFAIRS
BUREAU LEVEL
BUREAU OF INDIAN AFFAIRS
ASSISTANT SECRETARY FOR INDIAN AFFAIRS
MANAGEMENT IMPROVEMENT IMPLEMENTATION REVIEW OFFICE
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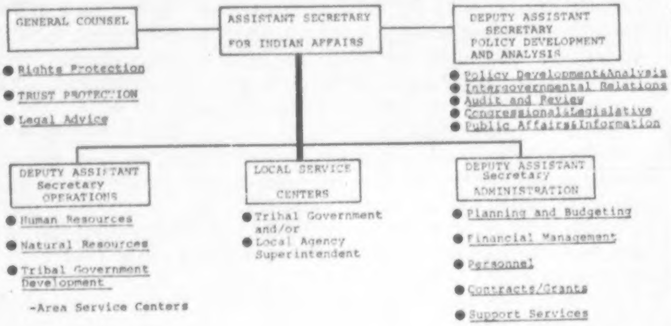
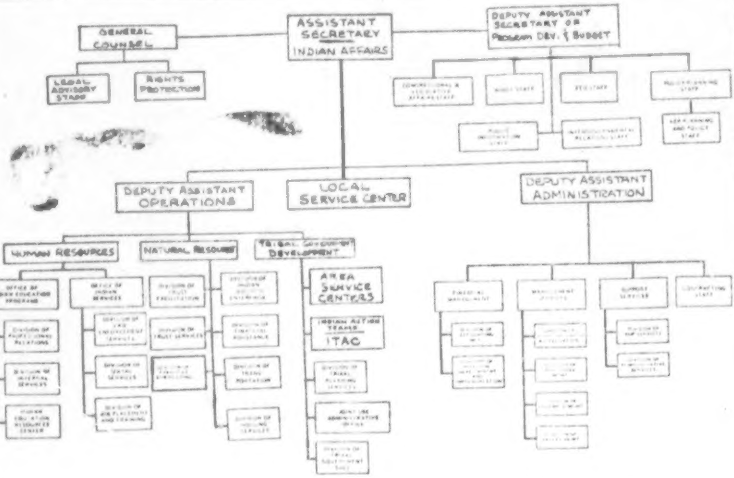

GENERAL COUNSEL
ASSISTANT SECRETARY FOR INDIAN AFFAIRS
DEPUTY ASSISTANT SECRETARY POLICY DEVELOPMENT AND ANALYSIS
● Rights Protection
● TRUST PROTECTION
● Legal Advice
● Policy Development&Analysis
● Intergovernmental Relations
● Audit and Review
● Congressional&Legislative
● Public Affairs&Information
DEPUTY ASSISTANT Secretary OPERATIONS
LOCAL SERVICE CENTERS
DEPUTY ASSISTANT Secretary ADMINISTRATION
● Human Resources
● Natural Resources
● Tribal Government Development
-Area Service Centers
● Tribal Government and/or
● Local Agency Superintendent
● Planning and Budgeting
● Financial Management
● Personnel
● Contracts/Grants
● Support Services

PROPOSED ORGANIZATION CHART
FOR BUREAU OF INDIAN AFFAIRS


GENERAL COUNSEL
LEGAL ADVISORY STAFF
RIGHTS PROTECTION
ASSISTANT SECRETARY INDIAN AFFAIRS
DEPUTY ASSISTANT SECRETARY OF PROGRAM DEV. & BUDGET
DEPUTY ASSISTANT OPERATIONS
LOCAL SERVICE CENTER
DEPUTY ASSISTANT ADMINISTRATION
HUMAN RESOURCES
NATURAL RESOURC
TRIBAL GOVERNMENT DEVELOPMENT
AREA SERVICE CENTERS
INDIAN ACTION TEAMS
ITAC

* REALIGNMENT SCHEDULE ACCOMPLISHED
NO LATER THAN JANUARY, 1978.

* PROPOSED ORGANIZATION CHART
FOR BUREAU OF INDIAN AFFAIRS

THE CREATION OF SEPARATE INDIAN COMMITTEE IN CONGRESS

While the administration of Indian affairs in the Congress was not directly considered when the Review Commission was established, the congressional process is an integral part of Indian affairs. It was vital, therefore, that the Review Commission consider the issue of congressional jurisdiction over Indian affairs.

From the early 1800's until 1946, the Senate and the House had vested jurisdiction over Indian affairs through full standing committees. Under the Legislative Reorganization Act of 1946, the committees on Indian affairs were abolished and the legislative and oversight jurisdiction over Indian matters was vested in the Committees on Public Lands in the House and Senate prior to the termination era. Since that time through the 94th Congress, these committees maintained a subcommittee on Indian Affairs. Although several major useful pieces of legislation affecting Indians were enacted during the 30-year interval, this subcommittee arrangement has failed to provide an adequate forum for legislating appropriate solutions to problems affecting Indian people.

In the 95th Congress, the Senate has, under S.J. Res. 4, created a temporary Select Committee on Indian Affairs. This is a step forward in the Senate's approach to Indian affairs. However, in the 95th Congress, the House of Representatives has taken a step backwards, by merging the Subcommittee on Indian Affairs into a subcommittee which also has jurisdiction over public lands. Under this arrangement, the importance of Indian affairs will be further diminished. Furthermore, other portions of Indian affairs are handled by other committees; i.e., Education and Labor Committees has certain responsibility for Indian education; Indian health is handled by another committee and economic development by another. In the Congress overall there are more than 10 committees with responsibility for some Indian activities, with the result that Indian affairs is treated in a disjointed, uncoordinated, and haphazard manner. Many of these committees are unable to handle Indian affairs adequately because they usually lack staff trained in Indian matters. Generally, Congressional staff people are experienced and trained in general administration and do not have the knowledge and experience to deal with the uniqueness of Indian people. These special qualities can only be developed through long experience in Indian affairs through a permanent organization.

Unless Congress accepts its responsibility to the Indian people by establishing permanent select committees on Indian affairs in the House and the Senate, problems affecting Indian people cannot be fully resolved.

A. Congressional Responsibility for Indian Affairs

In 1787, the Constitution Convention approved the Constitution of the United States and sent it to Congress for action. Article 1, Section 8, Clause 3 of the Constitution provided Congress with the power "to regulate commerce with foreign nations and among the several States and with *Indian tribes.*" [Emphasis added.] The Federal courts have since held that the plenary power of Congress over Indian Affairs derives from its responsibility for regulating commerce with Indian tribes and from treaty-making. As a consequence, Indians and Indian tribes, more than any other segment of the American population, have been uniquely affected by congressional action or inaction in their daily lives.

In fulfilling the responsibilities set out in the constitutional documents, the Congresses established ad hoc, select, or standing committees as their needs required. The Continental Congress on June 16, 1775, established a Committee on Indian Affairs which was charged with several duties including that of taking steps "* * * for securing and preserving the friendship of the Indian Nations." In the next year on April 26, 1776, the Continental Congress established a Standing Committee on Indian Affairs. The early Congresses under the Constitution of the United States followed a similar practice but did not establish a standing Committee on Indian Affairs in the Senate until January 4, 1820. The House of Representatives established a standing Committee on Indian Affairs until 1947 when it was made a part of the Committee on Interior and Insular Affairs pursuant to the Legislative Reorganization Act of 1946.

B. The Unique Status of Indians

Since Indians are the only group of people specifically identified in the Constitution, it is clear that a special and unique political relationship exists between the Indian tribes and the Federal Government. To fulfill these historic obligations to the Indians, the Federal Government through treaties and statutes has promised to serve as trustee to the Indian tribes and Indian people.

As the trustee, the Federal Government ought to organize itself to provide those services for protection and enhancement. Furthermore, the Federal Government as trustee is accountable for performance at the highest degree of skill, care and diligence with the "Prime Agent" and officials held personally responsible for any breach thereof.

The Congress itself is the most essential part of the Federal side of the Federal-Indian relationship. Having recognized and ratified Indian treaties, established constitutional relations, enacted subsequent laws regarding Indians, Congress is responsible for maintaining the polices and practices so created.

A committee through which the Congress can provide oversight and consider new plans, new schedules, and funding needs is essential.

During the 19th century, Indian Affairs played a major role in the affairs of the United States. Indian issues have decreased in importance, but the uniqueness of Indian tribes in their relationship with the United States remains. The special trust responsibility for Indian tribes and their resources has not been diminished and should be acknowledged by the Congress through the creation of permanent standing committees on Indian affairs in both Houses.

C. Conflict of Interest in the Management of Indian Affairs

The jurisdictional basis of the Interior Committees into which Indian affairs has been merged since 1946 has given rise to severe conflicts of interest. The responsibility of the Interior Committee to legislate in areas of public lands, national parks, mining and water and power resources has often been in conflict with Indian trust interests. So long as Congress fails to vest jurisdiction over Indian matters in cases of conflicts of interest, Indian interests will suffer.

D. Congressional Consideration of Indian Issues Requires a Permanent Select Committee on Indian Affairs

The complexity and volume of Indian law and the many problems affecting the Indian people call for a permanent standing committee on Indian Affairs.

Among the complexities which will face Congress in the coming years will be the resolution of Indian claims for land taken by States and others in violation of the Indian Trade and Intercourse Act of the late 1700's and the early 1800's. Most widely known are the Passamaquoddy and Penobscot Indian claims in Maine and Massachusetts. Similarly, the Catawbas have such a claim in South Carolina. Moreover, the Crow Indians may have claims for the return of large areas of land acquired in violation of their Allotment Act. The research to identify a reasoned and principled legislative approach to such situations is extensive. The interests and responsibilities of disparate groups must be considered in sensitive negotiations, which must resolve these claims. Congress can expect to confront many of these situations and a permanent Indian affairs committee adequately staffed is necessary to ensure continuous principled and appropriate legislation.

Many of the statutes in title 25 of the United States Code are obsolete, in conflict with later legislation, are in conflict with Federal policy, duplicative and lack clarity of legislative intent. These laws are not organized in a logical or practical format and must be reviewed, consolidated, and codified.

The last title of the United States Code to be revised and codified into positive law was title 5 (Government Organization and Employees). This revision and codification process took more than 8 years with an initial staff of 29 people, and which had the active support of the executive agencies. The resolution of many Indian questions cannot be resolved without a fully staffed Indian committee.

Besides the land title cases and revision of title 25, it is incumbent upon Congress to act on other Indian-related legislation. In the past, the small staff of the Indian Affairs Subcommittee has been able to prepare reports and draft legislation on only a very small fraction of proposed Indian legislation.

Finally, the oversight responsibilities placed upon Congress on Indian affairs, are particularly important and time-consuming to the nature of Indian bureaucracy. Because Indian tribes and Indian people are scattered throughout the Nation, no political pressure lobbying processes are available. More and more, it appears that congressional delegations from States with significant Indian populations are catering to those constituents with the greatest political voting power. Where those interests conflict with Indian interests, the Members of Congress are reluctant to openly and vigorously support the legal status and promote protection, preservation and enhancement of Indian assets. Indian issues are national obligations and cannot be resolved through a local or regional view. Consequently, carefully documented investigation and oversight activities are necessary, and can only be accomplished with consistency by a permanent Indian committee.

RECOMMENDATIONS FOR FEDERAL ADMINISTRATION

ELIGIBILITY OF TRIBES FOR FEDERAL PROGRAMS

The Commission recommends that:

Congress enact affirmative legislation to reaffirm and guarantee the permanence and viability of tribal governments within the Federal system.

Congress clarify the eligibility of tribal governments as prime sponsors for Federal domestic assistance programs and other programs delegated to State and local governments.

Congress enact legislation establishing tribal governments as equal to State governments in Federal domestic assistance programs. This should include amendment of all enabling legislation, program acts, and administrative regulations which require tribal governments to come under State jurisdiction.

Congress amend the Intergovernmental Cooperation Act to include tribal governments, and enact the Federal Program Information Act (S. 3281) to include Indian tribes.

Congress appropriate such funds as are necessary to allow the preparation of operations and procedure manuals to be used by tribal governments in their administration of tribal government affairs. These manuals would include operation models presenting alternative systems of financial management, accounting, personnel policies, and procedures, management information and organization structure.

Congress enact Senate Bill S. 2175—Public Participation in Government Proceedings Act of 1976.

ESTABLISHMENT OF INDIAN CAREER SERVICE

The Commission recommends that:

The executive branch establish an Indian Career Service consistent with statutory provisions and should be charged with the reponsibility of developing the employment standards as required by section 12 of the Indian Reorganization Act of 1934.[72]

The executive branch propose a plan to implement the provisions of section 12 of the Indian Reorganization Act of 1934 by establishing standards for the hiring of Indians apart from the requirements of civil service laws in the Bureau of Indian Affairs and the Indian Health Service.

Congress amend section 12 of the Indian Reorganization Act of 1934 to make the Indian preference provisions applicable to all Federal agencies administering programs specifically directed to Indian affairs.

CONTRACTING PREFERENCE AND TECHNICAL ASSISTANCE

The Commission recommends that:

The executive branch coordinate efforts to provide for the direct administration of contract funds by the Indian people.

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[72] A complete legal analysis with findings related to Indian preference laws is contained in the Task Force Number Nine final report, vol. I., pp. 106–120.

The executive branch direct the implementation of section 7(b)[73] of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b) supp. 1976) to direct its applicability to all Federal agencies; further to direct the General Services Administration to amend Federal procurement regulations to:

Clarify the scope and intent of section 7(b).

Emphasize that contradicting orders cannot modify a congressional act.

Clarify that title VII, section 703(i) of the 1964 Civil Rights Act provides for permissible preferences.

Provide standard Indian preference language be included.

The executive branch direct that the Office of Federal Contract Compliance within OMB offer a statement in support of the amended Federal procurement regulations.

The Bureau of Indian Affairs compile and maintain a permanent list of qualified Indian contractors; such a list to be maintained; standards being maintained; such lists to be available to all Federal agencies.

The executive branch coordinate and consolidate all technical assistance efforts into a single agency.

The executive branch establish a national professional and technical Indian skills bank administered by Indians.

The executive branch should direct and coordinate all agencies to establish a model National Indian Technical Assistance Center—consolidating personnel with technical assistance grants and contracts. Such consolidation to run parallel to existing BIA service units to test the feasibility of an independent agency service center.

LONG-RANGE EXECUTIVE REORGANIZATION OF INDIAN ADMINISTRATION

The Commission recommends that:

The President submit to Congress a reorganization plan creating a Department of Indian Affairs or independent agency to be comprised of appropriate functions now mainly administered by the Bureau of Indian Affairs, Indian Health Service, and agencies within the Interior and Justice Departments. Rights protection be consolidated as set forth in chapter 4 of this report.[74]

The plan for a transfer of appropriate programs and functions to the new agency include a review of those programs identified in part III of this chapter. In the interim, the President establish a temporary special action office within the White House which would be charged with responsibility for preparing a plan for the President.

The President designate the Secretary of the Interior and the Secretary of Health, Education, and Welfare to implement and coordinate efforts to evaluate and plan the transfer of various agencies in the event of the establishment of a department or of an independent agency.

Congress authorizes a management study of the Indian Health Service to be conducted utilizing experts from the public and private sector and representatives from the Indian community.

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[73] A legal analysis of the mandates of Indian contracting under 7(b) is contained in the final report of Task Force Number Nine in VI, 2:C.

[74] The authority of the President to reorganize the executive branch (see chapter 9, title 5, U.S.C.) does not include the creation of a new cabinet or executive department, the President submit to Congress a reorganization plan.

The President submit to Congress an appropriate plan for the removal of all Indian education programs from the Office of Education, in the Department of Health, Education, and Welfare and the Bureau of Indian Affairs to a consolidated independent Indian agency. Such Executive action would establish:

Stronger lines of communication between tribes and the source of educational funding;

An administrative structure that would support the development of tribal control;

Direct targeting of moneys and services to tribal communities;

A reliable data base, such that effectiveness of fund utilization can be monitored;

Programs that permit individualization of services to meet the unique needs of each project; and

Direct rather than coincidental aid for educational problems.

SHORT-RANGE EXECUTIVE BRANCH PROPOSALS

The Commission recommends that:

The Secretary of the Interior implement an action plan for the modernization of the Bureau of Indian Affairs in order to change it from a management to a service agency. Such a plan give maximum consideration to the Commission's "BIA Management Study" proposals. Generally these are:

A new organizational structure be established to transfer authority and responsibility to the local level. Particularly, the present area offices be divested of their line authority and be established as service centers.

The establishment of a planning and budget system which will stimulate Indian tribal participation and place more emphasis on tribal project priorities in the congressional appropriation process. Tribes should participate in the budget process directly with the Commissioner or Assistant Secretary of Indian Affairs and Congress to the greatest degree possible.

The establishment of a program to improve the communications and management information system throughout the BIA and contract for access to an automatic data processing system which will also be made available to tribal computer terminals.

The reorganization of the personnel system to improve BIA effectiveness while continuing to train, hire, and upgrade Indians.

The executive branch direct the Secretary of the Interior to compile an appropriate manual of operations which will define and publish minimum and standard threshold trust protections in management, procedures, accounting, monitoring, evaluation, and reporting which should be provided as a standard for all Departments and their field offices as well as for Indian tribes.

The Secretary of the Interior, under existing authority, undertake the amendment of the rules of procedure of the Department of the Interior (43 C.F.R. subtitle (a), 1975) pursuant to sec. 4(d) of the Administrative Procedures Act (5 U.S.C. 553(e) and 43 C.F.R. 14.1) to provide compensation for certain participants in the rulemaking and adjudicatory proceedings conducted by the Department of the Interior, including public informal hearings conducted in rulemaking procedures.

The Secretary of the Interior direct that the Commissioner of Indian Affairs be given Assistant Secretary status. This can be accomplished administratively, but may require other supporting legislation.

The Secretary of the Interior remove the Associate Solicitor's Office of Indian Affairs from the Interior Solicitor's Office and create an Office of the General Counsel in the Bureau of Indian Affairs.

The Secretary of the Interior establish a separate office of Indian program development and budget, as well as a separate office of policy analysis for Indian Affairs under the Assistant Secretary, Program Development and Budget.

The Deputy Under Secretary for Indian Affairs become an integral part of an implementation team and direct Secretarial in-house administrative action.

The Secretary of the Interior direct the Bureau of Indian Affairs to establish a duly elected Board of Regents to be recognized as a unit representing tribes and tribal opinion to contract for and administer post-secondary schools.

The Secretary of the Interior direct the Bureau of Indian Affairs to establish that a duly elected Board of Regents representing each tribe be recognized as a unit representing tribes and tribal opinions to contract for and administer those multitribal elementary and secondary schools.

CREATION OF CONGRESSIONAL INDIAN AFFAIRS COMMITTEES

The Commission recommends that:

Congress establish permanent standing or special select committees for Indian Affairs in each House or place all jurisdiction, oversight, and legislative authority in one joint select committee.

CHAPTER SEVEN

THE ECONOMICS OF INDIAN COUNTRY

The first and most basic step for development is to set development goals which reflect the long-term interests of all tribal members. Once these goals are established, tribes can then evaluate their possible strategies and tactics. There is an essential theme which will carry tribes through all aspects of the development process. Tribes must reclaim control over their resources—land, water, minerals, timber, fisheries, etc., and they must be responsible for all decisions as to their use and development. For a tribe whose goal is self-determination, every program should be evaluated for its impact on the tribe's ability to establish a meaningful development process.

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CHAPTER SEVEN

THE ECONOMICS OF INDIAN COUNTRY

OVERVIEW

Indian people have had to relinquish their lands and resources, giving way to the white man's needs. In 1887, there were almost 2 billion acres of land under Indian use. By 1924, this total had shrunk to 150 million acres; by 1975, to 50 million acres. This process was most dramatic during the early history of this country. But economic and social deprivation still continued. Too often, Indian timber, minerals, water, rich agriculture and grazing lands, are exploited through leases whose return is grossly unfair.

The administration of Federal programs and the execution of the trust responsibility of the U.S. Government should be directed toward establishing or reconstituting viable economies. Instead, a relationship of dependency has been allowed to grow between Indian people and the United States Government. A look at the Federal Indian budget demonstrates that the primary condition being fostered continues to be one of dependency.

Sixty percent of the Indian budget is committed to providing social-welfare services, which are generally available to all other Americans as well. Yet, only 9.5 percent of the budget is used for the execution of the trust responsibility of the United States to protect the remaining natural resources of Indians and further development of Indian country.[1]

The development task is a difficult one. For the most part, Indian reservations suffer from all the well-known symptoms of extreme poverty in America although some tribes have begun slowly to reverse that existing condition by demonstrating that carefully planned projects can result in success and productivity. These accomplishments are truly significant when it is understood that the tribes have not had autonomous control over decisions with respect to resource allocation and reinvestment of returns on original investments. They have taken the initiative in insuring that their lands be utilized in such a manner that returns from production flow to the tribe rather than elsewhere; that prudent investments in industrial development are encouraged within their territories; and that a relatively stable and efficient Indian labor force be established. But this is not the case for the large majority of tribes. In fact, indicators show that dependency, not productivity, continues to rise. However, the gains pointed out in some areas are mentioned to illustrate that under certain conditions tribal governments can establish improvements in economic productivity even in the face of complex, adverse conditions.

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[1] U.S. Dept. of the Interior budget justifications, Bureau of Indian Affairs, fiscal year 1978.

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Even casual observers have been startled by the stark contrast in economic conditions between reservation lands and adjoining nonreservation lands and communities. There has been an obvious lack of meaningful development of tribal lands while one can observe prospering communities just beyond reservation borders. To simply record the income gaps and then suggest that existing national income redistribution (poverty) programs will provide the necessary solutions toward reversing reservation economic dependency is the traditional but plainly inadequate response.

CAUSATIVE FACTORS OF DEPENDENCY

Before one can begin to formulate revitalization plans, it is necessary to come to grips with fundamental historical and causative factors which resulted in the creation of a dependency environment. Over the years, rather than encouraging tribes to initiate tribal production activities, the Federal Government has increased dependency by encouraging the destruction of the tribal social fabric. In response to antitribal administrative actions, tribal members developed ingenious ways to preserve tribal culture under difficult conditions, a situation which still exists in Indian country.

As an example, in a report to Congress by the General Accounting Office (GAO) in discussing the Gross Reservation Product (GRP) of one tribe, it was noted that even though the GRP had increased by 89 percent from $20.3 million in 1968 to $38.5 million in 1972 the bulk of the increase was in Government expenditures. Government expenditures increased from 34 percent of the GRP in 1968 to 50 percent in 1972, showing an increase in dependency. The per capita monetary income to tribal members increased by 65 percent from $835 in 1968 to $1,380 in 1972. This shows an important percentage increase. However, it is a percentage figure based on a minimal income base and does not represent any significant increased income. A breakdown of tribal per capita income follows:

	1968		1972	
	Amount	Percent	Amount	Percent
Income from wages and salaries	$610	73	$1,063	77
Education scholarships and vocational training	17	2	23	2
Veterans and social security benefits	48	6	69	5
Welfare and unemployment payments	160	19	225	16
Total	835	100	1,380	100

It is important to note that while there were increased expenditures in education scholarships and vocational training, the effort in this area remained constant at 2 percent.[3] It must be noted that there was a decrease in percent spent on welfare and unemployment payments. These figures are encouraging. If additional opportunities for training and education in the economies such as business management and natural resources were available, Indian tribes would have an increased capacity for developing a self-sufficient economy.

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[3] U.S. Comptroller General, report to the Congress, Better Overall Planning Needed To Improve the Standard of Living of White Mountain Apaches of Arizona, Washington, D.C.: GAO, Aug. 12, 1975, p. 34.

Although absolute productivity on reservation has increased, the bulk of transfers have resulted in a reduction of relative productivity in relation to total income in Indian communities. In other words, the rate of increase in expenditures by the United States has exceeded the rate of increase in reservation productivity. This situation might have been averted if the Federal policy would have permitted a flow of investment capital to reservations via development banks or other intermediaries. Unfortunately, the fact is that on some of the largest reservations productive income generated by the tribe or its members only makes up 10 percent of the total distributed income. The continuation of policies which lead to such conditions does not lend itself to investment opportunities.

INDIAN CONTROL NECESSARY FOR ECONOMIC SELF-SUFFICIENCY

Indian people can regain their historic economic self-sufficiency only if they regain control over their natural resources and begin to develop these resources themselves. The following section first discusses what Congress must do to return to Indian people control of their own resources. Second, it examines the action Congress must take to support Indian people in their struggle to develop their resources by and for themselves. Self-reliance is not possible without an initial commitment of Federal assistance. This means using Federal assistance to accomplish goals set by Indian people.

We must view the issues of economic development as critical to other issues that Congress is attempting to resolve—particularly issues relating to Indian self-determination. Implicit in the policy of Indian self-determination is assistance to the tribes for the purpose of reducing their dependence on the Federal Government.

To develop, Indian people must move away from the dependency relationship. The consensus of Indian opinion is that self-sufficiency is the primary goal of development. If self-sufficiency is the goal, self-reliance is the only possible means. Self-reliance will not mean scorning all Federal assistance. It does require effective and wise use of that assistance. Self-reliance means determining a truly Indian development process, using Indian labor, Indian resources, and Indian creativity.

The first and most basic step for development is to set development goals which reflect the long-term interests of all tribal members. Once these goals are established, tribes can then evaluate their possible strategies and tactics. There is an essential theme which will carry tribes through all aspects of the development process. Tribes must reclaim control over their resources—land, water, minerals, timber, fisheries, etc., and they must be responsible for all decisions as to their use and development. For a tribe whose goal is self-determination, every program should be evaluated for its impact on the tribe's ability to establish a meaningful development process.

THE FEDERAL ROLE

The policy changes discussed above must be viewed as fundamental. The Federal role must be to provide a favorable climate for economic development. This policy must be expressed through drastically increased appropriations for capitalization of necessary community facilities, enterprise development projects, and other essential community support system, and by alternative means for acquiring capital resources. New Indian financing mechanisms (e.g., development banks) and investment procedures must be established and development of basic skills and technologies must be fostered.

This chapter will examine the structure of differing tribal economies and the use of their reservation resources. The analysis contained herein is based on Indian comments from across the country and, it is believed, reflects faithfully the opinions and desires of Indian people.

NATURAL RESOURCES PROTECTION AND RECOVERY

Land

The overwhelming conviction of Indian people is that an adequate tribal land base is essential. Their economic security and development of tribal economies depend on it: the very survival of Indian cultures and the permanency of Indian tribes as governmental units depend on it. Recognition of this basic fact was the reason the Federal Government established Indian reservations in the 18th and 19th centuries. The allotment policy contained in the 1887 Dawes Act represented a complete reversal by the U.S. Government. The clear intent of the allotment policy was to break up the tribes' communal land base in order to force the assimilation of Indian people into non-Indian society. The result is the bizarre land ownership patterns existent on many reservations which make it virtually impossible for those tribes to engage in meaningful economic development. The importance of land to the Indian was recognized again in the 1930's when the Indian Reorganization Act of 1934 (IRA) was enacted by Congress. But Indians were again subjected to a radical shift in Federal policy when, in the 1950's, a Federal termination policy prevailed and over 3 million acres of land passed from Indian ownership.

This ambivalence of the United States Government has taken a very heavy toll over the years.

HISTORY OF INDIAN LAND LOSS

In 1875, 4 years after Congress had ended formal treatymaking with Indian tribes, the total Indian reservation land base stood at approximately 166 million acres, or about 12 percent of the land in the continental United States.

By 1887, with the passage of the General Allotment Act, further cessions of lands had occurred pursuant to agreements urged by the United States and Indian landholdings diminished to less than 137 million acres. But, the next 45 years were even more disastrous for the Indian. Tremendous political pressure in the West for the opening up of more land to homesteading, the involuntary allotment of tribal lands to individual Indians, and the sale to non-Indians of "surplus lands" from reservations resulted in the Indian land base being reduced to approximately 52 million acres by 1934, close to what it is today.

The story of this loss of land has been documented previously by many authors and Government reports,[4] and is discussed in detail earlier in this report. Thus, it is not necessary to reexamine indepth this historical movement. In order to understand the Indians' caution with respect to Government policy, however, a brief look is helpful.

Under the General Allotment Act of 1887, 118 reservations were allotted and of those 44 were opened to homestead entry under public land laws. Approximately 38 million acres of Indian land were "ceded" outright to the Government with the proceeds distributed in per capita payments or agency funds. Another 22 million acres of so-called surplus tribal lands existed after allotments were made and reservations opened for settlement by non-Indians.[5]

Of the tribal lands allotted to individual Indians, a trust period of 25 years was placed on the land with restrictions upon State taxation and on the owner's right to sell his or her land without the Government's consent. After 25 years, a fee patent would be issued removing all restrictions and protections. As a result of issuance of fee patents, 23 million acres were sold out of Indian hands between 1887 and 1934.[6] often to pay debts or provide immediate income for poverty-stricken families; an additional 3.7 million acres were sold by special permission. By 1934, 3 percent of the allotted land converted to fee patents remained in Indian ownership.[7]

Primarily, in recognition of the failure of the allotment policy, Congress, in 1934, enacted the Indian Reorganization Act (IRA), which was aimed at tribal economic rehabilitation. That Act halted further allotments, extended indefinitely the trust status of those allotted lands not yet granted a fee patent, and restricted their conveyance to tribes and other Indians.[8] The IRA also authorized the Secretary of Interior to "acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations * * * for the purpose of providing land for Indians,"[9] and it authorized the appropriation of $2 million annually. It also specified that title to any lands acquired under the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."[10]

Initially, the Bureau of Indian Affairs was aggressive in seeking funds under section 5 of the Act to acquire lands and place them in trust for Indians. In 1936 and 1937, Congress appropriated a total of $2 million for this purpose.[11] However, appropriations for land acquisition dropped off steadily. In 1944, nothing was appropriated under the Act.[12] The result was that in the 40-year period since passage of the IRA, a total of $5,988,077 has been expended under section 5 of the IRA for land acquisition and consolidation on behalf of Indians.[13] This money purchased 595,157 acres, over 70 percent of which was suitable at best only for grazing livestock. If the authorization under the Act had been used to its fullest extent, there would have been appropriated more than $80 million for land acquisition and consolidation.

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[4] E.g., Brophy & Aberle, The Indian: America's Unfinished Business (U. of Okla. Press, 1966); Kickingbird & Ducheneaux, One Hundred Million Acres (Macmillan, 1973); S. Rept. 91-501, Indian Education: A National Tragedy—A National Challenge, 91st Cong., 1st sess. (1969).

[5] National Resources Board, Report on Land Planning, Part X, Indian Land Tenure, Economic Status, and Population Trends, U.S. Govt. Print. Off., 1935.

[6] Ibid. at 6.

[7] Ibid.

[8] Act of June 16, 1934, 48 Stat. 984.

[9] Supra, sec. 5; 25 U.S.C. sec. 465.

[10] Ibid.

[11] BIA Report on Purchase of Indian Land, prepared upon request of the American Indian Policy Review Commission, May 1976.

[12] Ibid.

An even sadder aspect of this record is that within the same time period, in which the Federal Government was acquiring 595,157 acres for Indians, it was also taking other Indian lands. From 1936 through 1974, a total of 1,811,010 acres of land were taken. This does not even include lands taken for rights-of-way for roads, pipelines, powerlines, and other Federal or State projects.

It does, however, include loss of land for projects like the Garrison Reservoir (175,000 acres), Oahe Reservoir (101,952 acres), and the Riverton Project (16,152 acres). These takings were controversial at the time and even today are making national headlines. The opening of Garrison Dam in the spring of 1953 was a bitter defeat for the Fort Berthold Indians, as the dam flooded one-fourth of the reservation. The Bureau of Reclamation's original choice for a site prevailed even though it had been declared unsafe by the Corps of Engineers.[14] Today the Garrison Dam and Oahe Reservoir are among "the most economically wasteful and environmentally destructive" water projects built with Federal money.[15] The Bureau of Reclamation now claims, after severely disrupting the economic base of several tribes, that the Oahe Project would only return a dollar for each dollar spent and many white farmers do not want the project for fear of damage to their land.[16] The next land taking anticipated is the Fort McDowell Reservation by the Orme Dam Project, a part of the Central Arizona Project even though the State water engineer testified that "the project is viable with or without Orme."[17] However, historical experience has shown that it is less politically sensitive and less expensive to take Indian lands for Federal water projects than non-Indian lands. From 1936 through 1974, Indian people lost 488,226 acres of land. This is almost 13,000 acres per year, during a period when the official policy of the United States Government was to assist tribes in consolidating their land base and seeking economic self-sufficiency.

FRACTIONATED OWNERSHIP

Although there has been some improvement, much of Indian land is unusable because of fractionated ownership of trust allotments.[18] With each generation more and more heirs inherit interests in small parcels of land, and in some cases more than 100 individuals may hold interests in a 160-acre piece of land. In one case, on the Standing Rock

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[13] Ibid.

[14] Ibid., app. B.

[15] Grace Lichtenstein, "Dams Are An Endangered Species", New York Times, Mar. 1977.

[16] William Robbins, "President Is Viewed Firm on 19 Cuts", New York Times, Mar. 12, 1977

[17] Grace Lichtenstein, "Arizona Concerned by Aqueduct Fund Cut", New York Times, Mar. 16, 1977.

[18] See, e.g., Langone, S., The Heirship Problem and Its Effect on the Indian in Toward Economic Development for Native American Communities, U.S. Govt. Print. Off., Washington, D.C., 1969.

Reservation, 360 people own one allotment. More than 10 million acres of Indian land are burdened by this bizarre pattern of ownership. The BIA spends increasing amounts of money each year administering their lands. It was observed 20 years ago that "Indian allotments are useless except as a parcel to be combined with other land for a sufficient-sized livestock operation; for, whereas 2,500–3,000 acres are required in much of the Dakota country for an efficient ranch, the allotments range in size from 160–640 acres. Hence, individuals continue to sell their allotments, lease them to non-Indians, or let them lie idle.[19] Therefore, it is not surprising that non-Indian farmers cultivate about 63 percent of Indian agricultural lands and that Indian people believe that land consolidation and acquisition is important to their economic future.

CONSOLIDATION PROGRAMS

Some tribes have developed land acquisition and consolidation programs to solve the problem of "checkerboard" ownership of land. Frequently, these have been supported by tribal funds and, in some cases, by loans from the Federal Government. But past and current Federal loan programs have been woefully inadequate, totaling overall less than $50 million; and it is estimated that at least $1.5 billion is needed to buy the 10.2 million acres of existing allotted land.[20]

Moreover, not only are Federal loan programs insufficient, but they expose trust land to a serious threat. The Farmers Home Administration has been the largest source of loans for land repurchase in the last 6 years. Usually, tribes offer the land purchased or a guaranteed income, such as interest from trust funds, as collateral. To repay these loans, the tribe must put the land into production. If the land was originally allotted, it becomes fee simple land on foreclosure. Thus, a land consolidation effort based on loans secured by trust land could result in further loss of Indian land.[21]

The importance that Indians attach to reacquiring and stabilizing this land base is illustrated by the following excerpts from special tribal reports submitted to this Commission:[22]

Standing Rock Sioux Report:

> * * * today, one of the serious problems we have with the Indian administration is that they continue to fail to take any significant action with respect to restoring the land base. This should be their priority * * *. We believe that a viable solution to existing dependency related problems on Standing Rock, as well as those problems resulting from jurisdictional disputes is for the Indian administration to establish a concerted program to restore the reservation's original land base to the 1889 reservation boundaries. (P. 21.)

Crow Tribal Report:

> During the Eisenhower administration, individual Crow tribal members were able to apply for and receive patents-in-fee which allowed them to sell their allotted lands easily to eager non-Indian ranchers and farmers. The resultant effect was a second, rapid reduction in the total remaining land base than comprised the Crow Reservation. In 1976 the total Crow-owned land base that re-

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[19] Dorner, P., The Economic Position of the American Indian (108 Harvard University, 1959).
[20] Task Force No. 7 final report, AIPRC, July 1976, p. 37.
[21] Ibid. at 27.
[22] Special tribal reports to AIPRC, 1976.

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mained on the Crow Reservation is approximately 1.5 million acres, while the land base that accrued to non-Indians who reside within the reservation boundaries is approximately 700,000 acres. (Pp. 55–56.)

Walker River Paiute Tribal Report:

> Between 1906 and 1926, reservation agricultural land was allotted in 20 acre parcels. By the 1930's, these parcels proved to be uneconomical * * *. Even leased units are far too small to be competitive with surrounding profitable farm operations using modern methods and equipment * * *. The federal laws governing heirship of Indian trust allotments can and must be modified to consolidate ownership in order that the Indian owner can enjoy the privilege of complete ownership and productivity utilize the properties * * *. (P. 2, ch. 8.)

Affiliated Tribes of Northwest Indians:

> The concept of self-determination implies a substantial degree of economic independence. Though the funding sources are theoretically available, they are in most situations illusory or inadequate because of other impediments * * * to tribal economic development. (We) * * * have classified these impediments into four broad categories: (1) limited land resources and the lack of adequate Congressional appropriations for acquisition of additional land * * *.

The desire for land is not a romantic notion. It springs from a serious analysis by Indians of their needs for cultural survival and the economic improvement of their people. The integrity of their land base is essential for the preservation and enhancement of all other resources—water rights, fishing, hunting, and trapping, timber and mineral reserves—in that Indian livelihood is derived from the land.

To illustrate this point the Standing Rock Sioux Tribe in its report to the Commission found:[23]

> * * * It is clear to the Tribe that for us to become economically viable, we will need such a contiguous and restored land base. Those individuals who say that the reservation cannot be a viable place for Indian development do not know what they are talking about. Standing Rock never did agree to opening of the reservation under the Surplus Land Acts and does not agree to that to this day. We are advocating a restoration and land reform program, which can take place over a long period of time so that neither the Indian interests, nor the non-Indian interests will be discriminated against. Many people believe erroneously that non-Indians do not wish to sell their land. This is far from reality. The Tribe is continuously approached by non-Indians who wish to sell their land to the Tribe. * * * We believe that since there seems to be a steady and growing group who want to move from the reservation and since it is our objective to gain back as much of the land that was taken from us without our consent, that it is morally, as well as economically reasonable, that the Indian Administration develop a program whereby the Tribe can regain trust title of those alienated lands as they become available for sale * * *.

RECOMMENDATIONS

The Commission recommends that:

Congress appropriate funds and provide technical assistance to insure the preservation, consolidation, and acquisition of Indian lands upon which to build tribal future. This includes assisting tribes in devising comprehensive land consolidation plans, and assisting landless tribes in establishing a land base. Congress, therefore, must provide legislation which would:

(1) Increase the funds in the Revolving Loan Fund (Indian Financing Act) administered by the Bureau of Indian Affairs, and create a set-aside specifically for tribal land acquisition. These loans should carry lower interest rates and longer terms than now exist for other enterprises receiving loans under the Fund. Present

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[23] Ibid., Standing Rock, 1976.

requirements should remain which stipulate that there be a reasonable prospect of repayment and that the applicants must have exhausted other avenues of reasonable financing, but there should be less rigid requirements relating to the profitability of the land.

(2) Mandate that the Revolving Loan Fund have standby line of credit for tribes to use when immediate access to funds is necessary to purchase key tracts of land which are for sale and are essential to the tribe's acquisition or consolidation plans but would probably otherwise be lost to the tribe during the loan application process.

(3) Permit tribes to have a "first right of purchase" option when individually held trust land or non-Indian held land within a reservation is offered for sale.

(4) Amend section 5 of the Indian Reorganization Act to provide for an increased appropriation of funds for land acquisition, particularly for those tribes which are presently landless.

(5) Amend sections 1465 and 1495 of title 25 of the U.S. Code to delete the provisions of Indian Financing Act funds which restricts the use of purchase of lands outside the exterior boundaries of Indian country unless the purchaser was the owner of trust or restricted interests in the land prior to purchase.

(6) Amend the "excess property" provisions of the Federal Property and Administrative Services Act 40 U.S.C. section 471, et. seq., to specifically provide for transfers of excess property, whether located within or without the exterior boundaries of tribal lands, to the Bureau of Indian Affairs for use by Indian tribes.

(7) Mandate that the Secretary of Interior establish and make public specific criteria for accepting Indian lands in trust. Such criteria should include a presumption that lands owned in fee by a tribe or to be acquired in fee shall be accepted in trust unless the Secretary sets forth in writing sufficient reasons for refusal.

(8) Mandate that the Executive examine and report to the Congress on the feasibility of consolidating the Indian land acquisition loan program administered by the Department of Agriculture and the BIA loan programs into one Federal-Indian loan program designed exclusively for providing funds for tribal land consolidation plans. Land should also not be required as collateral for such loans.

To provide solutions for the debilitating problems presented by the fractionated ownership of heirship lands, Congress enact legislation which would:

(1) Amend the U.S. Code to enable tribal governments to adopt comprehensive plans for resolving fractionated heirship land problems. Such plans could include the following procedures:

(*a*) Guaranteeing that tribes have first right to purchase when heirship lands are sold.

(*b*) Authorizing the holders of a majority of the ownership interests in a trust, or restricted allotment, to determine sale of land.

(*c*) Enactment of tribal laws governing descent and distribution of fractionated heirship lands to allow purchase, at the time of probate of estates, undivided interest in allotments in heirship status which have reached an unreasonably small fraction; restriction of inheritance of trusts or restricted allotments to members of the tribe; or restriction of inheritance to a life estate with a remainder in the tribe, but only upon payment of fair market value compensation to the prospective heir.

(*d*) Condemnation with fair compensation by the tribe of lands in heirship status which have reached unreasonable small fractions.

(2) Repeal statutes which are obstacles to exchanges and/or sales between owners of allotment interests.

(3) Reform partitioning laws to facilitate partitioning of allotment interests held by heirs, if partitioning is in the best interest of their heirs and the tribe.

(4) Transfer the probate authority over trust property now held by the Secretary of the Interior to the tribe.

(5) Amend the special laws regarding the Five Civilized Tribes and the Osage to merge them with the general laws governing the other tribes, at least with respect to jurisdiction over small estates ($5,000 or less) and with respect to their capacity to write laws governing the descent and distribution of property.

AGRICULTURE

Indian lands and natural resources are located on over 200 reservations in 26 States and encompass in excess of 50 million acres. About 129 reservations have Indian populations of at least 200 and land of at least 1,000 acres.

Indian lands include: (1) 5.3 million acres of commercial forest land, which is about 1 percent of the Nation's commercial forest land and includes about 38 billion board-feet of timber, or 1½ percent of the Nation's total; (2) 44 million acres of rangeland, or about 5 percent of the Nation's total; (3) about 2.5 million acres of cropland, or 1 percent of the Nation's total.[24]

Indian range and croplands are valuable resources that provide Indian tribes and individual Indians with considerable income and job opportunities. In 1975, 26,189 Indian families obtained all or part of their livelihood from livestock and farming activities. But the potential yield from agricultural activity is not nearly achieved.[25]

According to 1975 BIA statistics, the gross value of agricultural products grown on Indian range and croplands amounted to $394 million. Of this amount, Indians received $123 million or less than one-third of the total value of range and farm products grown on Indian lands. Non-Indians, on the other hand, received $271 million or 69 percent of the total value of agricultural products produced on Indian lands.[26]

It has been estimated that the gross value of agricultural products grown on Indian range and croplands could be doubled if these resources were under more intense management. Numerous impediments to full achievement of the economic potential of Indian agricultural resources have been identified. These include problems relating to fractionated land ownership patterns, lack of access to capital funds, insufficient training in resource management, deficiencies in lease terms to both Indians and non-Indians, as well as nonenforcement of lease provisions by the BIA, and lack of general economic infrastructure such as roads, communications, etc. Land acquisition and consolidation and general economic infrastructure are dealt with elsewhere in this chapter. This section focuses only on issues related to farming and livestock production, and leasing of land for these purposes.

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[24] Report to the Committee on Interior and Insular Affairs, U.S. Senate, "Indian Natural Resources—Opportunities for Improved Management and Increased Productivity", GAO, Aug. 18, 1975 (B 114868), p. 1.

The BIA in its 1975 Land Use Inventory and Production Record (Form 50–1) classified 33,051,017 acres of Indian land as open grazing.

[25] 1975 BIA Form 50–1.

[26] 1975 BIA Form 50–1.

FARMING OF INDIAN LANDS

Importance of Indian Agriculture

According to 1974 BIA statistics, 2,440,172 acres, or 4.7 percent of all Indian trust land, were classified as agricultural. Of the almost 2½ million acres, 29 percent were irrigated and 71 percent were dry farm. While the size of Indian agricultural lands seems small, the value of products grown was considerable: $339,919,780.

However, 73 percent of this value was produced by non-Indian operators. Part I of the 50–1 form shows that non-Indian operators usually cultivate 63 percent of all Indian agricultural lands, while Indian operators cultivate 29 percent and 8 percent remains idle.[27]

TABLE 1.—INDIAN AGRICULTURAL LANDS USED BY INDIAN AND NON-INDIAN OPERATORS AND GROSS VALUE PRODUCT, 1974 [1]

	Type of land					
	Dry farm			Irrigated		
Operator	Acres	Gross value, product	Gross return per acre	Acres	Gross value, product	Gross return per acre
Indian	564, 630	$38, 643, 144	$68	70, 998	$24, 433, 041	$340
Non-Indian	936, 649	111, 617, 105	119	247, 047	134, 891, 467	464

[1] Figures based on calculations drawn from BIA 1974 Land Use Inventory and Production Record (form 50–1).

TABLE 2.—GROSS VALUE OF PRODUCTS GROWN ON INDIAN LANDS, 1975 [1]

Agriculture	Total value	Indian operated	Non-Indian operated	Indian/total gross value (percent)
Cultivated row crops	$95, 283, 812	$16, 324, 145	$78, 959, 667	5. 8
Small grains	115, 188, 919	26, 411, 411	88, 777, 508	22. 9
Forage, hay, and tame pasture	65, 101, 563	21, 962, 302	43, 139, 261	33. 7
Horticultural and garden crops	37, 612, 722	5, 154, 232	32, 458, 490	13. 7
Native hay	886, 811	667, 675	219, 136	75. 3
Grazing	78, 845, 106	52, 170, 523	27, 674, 583	65. 3
Total	393, 918, 933	122, 690, 288	271, 228, 645	31. 0

[1] Figures derived from the 1975 BIA Land Use Inventory and Production Record (form 50–1).

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[27] Calculations based on 1974 BIA 50–1 form, part I, for total Indian land in agriculture and use by Indian or non-Indian. Part VII for value of products grown. There is a discrepancy in the total amount of land classified as agricultural and the figures identifying its use. Eight percent of Indian-owned land classified as agricultural is idle, amounts to 195,213 acres. This figure, plus the average figures in the following table leave a discrepancy of 425,635 acres classified as agricultural but unaccounted for in these statistics.

Task Force Number Seven on economic development examined 32 reservations in depth. For the 10 reservations with the most agricultural land, they found that land use and economic return patterns correspond fully to that in the above table.[28] One is immediately struck by the fact that the non-Indian operator not only cultivates the bulk of Indian lands, but that his gross return per acre is higher.

The preceding table provides a breakdown of major crops and their value grown by Indians and non-Indians on Indian land in 1975. As shown by this table, in 1975, Indians derived only 31 percent of the total gross value of the cash crops grown on Indian owned lands. Non-Indians derived the other 69 percent.

There are numerous explanations for this phenomena. According to a 1974 GAO study at Fort Hall, the chief reason for not participating in high-dollar yield farming (irrigated) was that Indians (1) could not obtain credit; (2) lacked a knowledge of farming technology.[29] But this is only part of the explanation. The other lies in the problem of land ownership patterns brought about by the individual allotment of Indian lands and by policy decisions of the BIA in years past which favored leasing out of Indian land rather than stimulations of large-scale tribal development.

Tribal Enterprises

Some tribes have taken the initiative to break this lease cycle and develop their own tribally operated farm enterprises. The value of these enterprises is that not only do they provide a greater rate of return to the Indian community from their land, they also provide much needed jobs.

At Crow Creek, the tribe has brought 1,500 acres under dry farm cultivation, principally alfalfa and winter wheat. It obtained funds for land consolidation through FmHA and enterprise funds from EDA. The tribe reported that these funds were still insufficient for complete development of the farm. Eventually, the tribe hopes to have three units of 2,000 acres each under cultivation. Fifteen hundred acres would be irrigated. It is estimated that eight people would be employed full-time on the 60,000 acres, and many more through indirect supportive industries. In 1975, the farm enterprise had a net profit of $48,000 or $35 an acre. If this is compared to the gross cash rent per acre ($16.89) usually received in South Dakota, probable return would be more than doubled.[30]

The Umatilla farm enterprise manages the Umatilla tribal farm lands. The Umatilla obtained a loan from the Revolving Loan Fund to purchase land to start the farm. Income derived from the land is used to pay for land purchase loans, spraying, fertilizer, and related expenses. Through 1976, the tribe had 1,360 acres of land under cultivation which they hope to expand to 6,000 acres. The farm enterprise has generated a net income which exceeds the average net income received by Umatilla lessors.

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[28] Task Force No. 7, p. 33.

[29] Report to the Subcommittee on Indian Affairs Committee on Interior and Insular Affairs, U.S. Senate, "Land Leases on the Fort Hall Indian Reservation in Idaho", GAO: May 31, 1974; pp. 16–17.

[30] Farm Real Estate Market, Developments Economic Research Service, USDA, July 1975, p. 34.

TABLE 3.—TRIBAL ENTERPRISE INCOME VERSUS LEASING INCOME

Year	Total net income from tribal farm enterprise	Net income per acre	Average income received by Umatilla lessor
1973	$77,357	$58.60	$21.13
1974	61,431	46.53	37.12
1975	71,910	52.87	34.08

Source: Superintendent, Umatilla Agency, Pendleton, Oreg., 1976.

There are other examples of tribal agricultural development which did not fall within our survey. Among the most exciting developments is the Quechan hypodroponic farm. It demonstrates how the tribe marshaled the necessary grants and loans to buy land and put it into production using the latest techniques available.

Indian Rangelands

Rangelands and livestock operations are an important part of the Indian economy. The 1975 GAO report on Indian Natural Resources estimated 44 million acres existed on Indian reservations and found that Indian ranchers used about 90 percent of this land.[31] The Bureau of Indian Affairs in its 1975 Land Use Inventory reported some 15,074 Indian ranching operations accounted for livestock products valued at $74.8 million.

Conservation and Overgrazing

Despite the high amount of reported acreage classified as open grazing there are serious concerns regarding range management. According to the 1975 GAO study:

> An estimated 13 million acres, or 30 percent of Indian rangeland are not being properly managed and are in poor condition because (1) the range has been overgrazed, (2) range improvements have not been effectively used or maintained, and (3) limited use has been made of training and education programs. These problems have existed on some reservations for years. Short-term, stopgap measures have been taken to relieve the situation but the long-term problems still remain. An important factor hindering the effective management of Indian rangelands on some reservations is the conflict between tribal and individual Indian desires with respect to accepted range management practices. (1975 GAO report, pt. 1, p. 31).

About 60 percent of the Indian rangeland is located in two arid States—Arizona and New Mexico.

Rangeland is classified in four categories: excellent, good, fair, or poor—based on the comparison of the present amount and kind of forage with that which the range could optimally produce. GAO surveyed seven sample reservations and found conditions ranging from Northern Cheyenne Reservation with 85 percent classed as excellent to Ute Mountain with 68 percent fair to poor and Papago with 99 percent so classified.

With respect to the Papago, they reported findings that the range was grazed to double its capacity and attributed this partially to the failure of the tribe to adopt a grazing permit system.[32] They further concluded that with proper range management, beef production at Papago could be doubled.[33]

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[31] 1975 GAO report, pt. 1, p. 30.

The report noted that the Bureau has a trust responsibility for the management and protection of rangeland resources and cited the Indian Reorganization Act of 1934 as directing the Secretary of the Interior to restrict the number of livestock grazed on Indian range units to its estimated carrying capacity. The report further noted that for more than 40 years the Bureau has been telling the tribe that its rangeland is severely overgrazed but in that time neither the tribe nor the Bureau has imposed any control. In explanation of this, GAO states that "the foremost cause of overgrazing is a conflict between good range management practices and Indian culture and tradition" which place a high value on animal ownership and operation without restriction.[34]

LEASING

The General Allotment Act of 1887 divided tribally held land into individual Indian allotments. In the years following the passage of the Act, support grew for the concept of allowing Indians to lease their lands. The first general Indian land leasing statute, enacted in 1891, placed a restraint on Indian leasing by permitting Indians to lease their land only if they were unable to farm it "by reason of age or other disability." In theory, it was felt that if an allottee had the physical or mental capability to cultivate an allotment, the leasing of such an allotment should not be permitted. In practice, however, the leasing of allotted land fell prey to the influence of white settlers, and leasing often became the rule rather than the exception on some reservations.

Even at the time allotments were made to Indian owners their size was frequently inadequate to support an individual agricultural effort. Plots of 160 acres in sparsely vegetated rangelands were understood by western cattlemen to be inadequate for ranching activities. Plots of 40 or 80 acres on irrigable land may have been viable in the late 1800's, but not until properly irrigated, and funds for such purposes were slow in coming.

The first consequence of this fractionation of ownership out of the tribes into individual tracts was a mammoth loss of land out of Indian ownership into non-Indian hands. Between 1887 and 1934, approximately two-thirds or 90 million acres of the Indian land base passed out of Indian ownership into non-Indian hands. A secondary consequence of the individualization of Indian landholdings was the additional fractionation of individual ownership among succeeding heirs.

The final result of this fractionation of ownership into small parcels and multiple ownership is that major portions of lands classified as Indian owned are, in fact, under the dominion and control of non-Indians by virtue of their having been leased out. Uneconomic size plots, lack of capital, and lack of technical assistance force Indian owners to lease their lands to others. These facts were known to the Bureau of Indian Affairs in 1934 and were known by Congress. The Indian Reorganization Act of 1934, was designed to remedy at least a part of this problem by authorizing acquisition of lands and establishing a revolving loan fund. However, grossly inadequate sums were appropriated for land acquisition, the revolving loan fund quickly became fully committed, and the problems of heirship and land leasing continued unabated.

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[32] Ibid., p. 34.
[33] Ibid., p. 32.
[34] Ibid., pp. 34, 35.

In recent years, two steps have been taken to try to improve the Indian credit position. The Indian Finance Act of 1974[35] was enacted authorizing loans and providing grants for a number of purposes and the law governing the Farmers Home Administration loan program was amended to provide for loans to Indian tribes for acquisition of lands.[36] However, utilization of the revolving loan fund at BIA has not been effectively directed at resolution of the land question and the loan program of FmHA has serious impediments. More importantly, neither of these credit facilities has reached to the problem of excessive leasing of lands to non-Indians.

The leasing program has, in many instances, tied up tribal and individually owned trust land for years and today poses serious obstacles to tribal initiatives toward economic development and self-sufficiency. In its 1975 Land Use Inventory, the BIA estimated that Indian owned resources directly supported some 120,000 jobs by both Indian and non-Indian. This amounts to 20 percent of the entire Indian service population recognized by the BIA. A long step toward self-sufficiency would be taken if all of these jobs were held by Indians—the owners of the resource.

There are numerous problems with the leasing program aside from its adverse impact on tribal initiative to develop their own agricultural enterprises. The most serious of these problems are the inequitable lease rates that are obtained. Task Force Number Seven has provided detailed documentation of this problem relating case studies from two specific reservations, the Crow Tribe in Montana and Fort Hall in Idaho, to illustrate their point.

Crow Competent Leasing

A competent lease is a 5- or 10-year lease of allotted agricultural land in which the rent is prepaid for the entire term of the lease. For a given piece of land, the first 5-year period was paid in a lump sum when the land first went into competent lease status. Subsequently, once a year the current lease is canceled and a new one written, with payment of rent for the last year of the new lease discounted to the present. December is the most usual time to cancel and rewrite the leases.

The BIA's role is recording of leases. As long as the allotment is owned by five or fewer people, a competent lease is valid. If an allottee or a group of owners wishes to regain control of its land, he must wait 5 or 10 years. For poor people, this can be a long wait. Further, for many of the leases, and particularly for rangeland, even after the 5-year period, there would be only one potential lessor. Many of the lessors are large operators who lease land from many Indians. Many own fee-patented land interspersed among Indian allotments which they lease.

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[35] 25 U.S.C. sec. 1451 et seq.
[36] 25 U.S.C. secs. 488–492.

In June 1975, 868,281 acres of 1,205,926 acres of allotted land were under competent lease. This is 72 percent of the allotted land.

Such leasing constitutes a partial alienation of allotted land. Competent leases can be used as collateral for loans, while trust land cannot. This feature depends upon the existence of an assignment clause in the lease. Since Indians use competent leases as collateral for loans, such leases provide a method of financing, without which, Indians might otherwise feel forced to sell their lands.

Land Leases on the Fort Hall Indian Reservation

Since 1973, a controversy has raged at Fort Hall over a finding by the Economic Research Associates of Los Angeles, consultants for the tribe's overall economic development plan, required by EDA. They found that Fort Hall Indians failed to get equitable income for all agricultural land leased to non-Indian tenants. Typical nonreservation leases in the Fort Hall area averaged 35 percent of gross crop value, while Fort Hall leases were equivalent to about 2.3 percent of gross crop value.

In response to this study and a tribal request for an investigation, GAO conducted an investigation and also found there was a large disparity in lease rates, particularly in irrigated reservation land. Irrigated reservation land was found to rent at an average of $15.36 compared to $75.41 for high quality irrigated nonreservation land. Dry farm acreage rentals were approximately equal for reservation/nonreservation lands, but a substantial disparity was also found to exist for pasture rental. These findings of GAO were softened, however, by a finding that certain intangibles caused non-Indian lessors to be less willing to pay the same rent as for non-Indian land, but these intangibles were not fully identified.[37]

In 1975, another firm, Farm Management Co., did another evaluation of leasing at Fort Hall. They calculated the value of cash leases for both high quality and average quality nonreservation land, thus taking into consideration the tangible costs raised by GAO, and compared them to the value of cash leases for the same quality land on the reservation.

TABLE 4.—VALUE OF CASH LEASES[1]

	Nonreservation land				Reservation land			
	High quality		Average quality		High quality		Average quality	
	Potatoes	Grain	Potatoes	Grain	Potatoes	Grain	Potatoes	Grain
Value of cash lease	$64-$80	$40-$60	$26-$39	$9-$19	$35	$35	$35	$35
Average	56- 70		17- 24		35		35	

[1] Western Farm Management Co., "Analysis of Present Leasing Practices" and the effect on rental rates of tribal agricultural land, funded by EDA, Technical Assistance Grant No. 07-6-01534, pp. 52-53.

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[37] Report to the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, U.S. Senate, "Land Leases on the Fort Hall Indian Reservation in Idaho," GAO May 31, 1974.

Since potatoes are normally rotated every other year with a grain crop, the average cash rent is $56–$70 on the better soils and $17–$24 on the sandier soils. After the first reports of ERA and GAO, the tribal council increased the standard rent per acre from an average of $15 to $35 an acre. However, this fixed fee allows the better lands to stay in farming at a bargain price while the poorer or marginal lands were abandoned because of lower yields, greater fertilizer expense and difficulty in irrigating this type of soil. Using standard lease rates for the entire reservation has caused the tribe to receive less rent than it should for better farmland and the poorer land is left idle.

In 1974, the Shoshone-Bannock Tribes at Fort Hall commissioned an additional comprehensive study by an economist, Mr. Jack Peterson, under a HUD 701 planning grant. This study published in 1974, and updated in 1976, confirms the continued inequitable leasing practices.[38]

Leasing practices have provided Indian landowners with very substandard returns for the following reasons:

Fixed rate rentals on Indian land are substantially less than on non-Indian land.

Indian fixed rate rentals are preferred over crop share rental.

Indian lessors have no recourse when leases are violated.

Leases are for lengthy periods of time.

Lease regulations for proper conservation practices are unenforceable.

What is the alternative to leasing? On several of the sample reservations, particularly Umatilla and Crow Creek, tribes have consolidated tracts of trust land and are farming it. This would solve a multitude of problems. First, efficient-size units could be created. Second, the tribe has better access to capital and technical assistance than do individuals. Third, returns are usually higher than leasing and are directly received by the tribe.

These criticisms related equally to farm and grazing lands. The lack of readily available capital and the lack of a sound policy directed toward land consolidation, acquisition, and termination of these present lease programs combine to thwart tribal development and economic self-sufficiency.

Credit and Technical Assistance

Aside from fractionated land ownership, the major obstacles to development of a viable Indian farm economy are inadequate credit and lack of necessary technical assistance.

The Indian farm operator has three major sources of credit: commercial banks, Farmers Home Administration, and the BIA Revolving Loan Fund. Both commercial banks and the FHA require acceptable collateral, and as GAO reported they were reluctant to accept Indian land as collateral because of its trust status. In reviewing new BIA revolving loans made during fiscal year 1975, it appears that the bulk of individual loans were made for purposes other than agriculture. Only 16 percent went for agriculture and livestock activities. (See table 5.)

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[38] Jack Peterson, Futures, A Comprehensive Plan for the Shoshone-Bannock Tribe, funded by a 701 Planning Grant, HUD, 1974, p. 14.

TABLE 5.—*Distribution by type of new BIA revolving loans to individuals, fiscal year 1975*

Type of loan	*Percent*
Agriculture	15.9
Farming	8.4
Livestock	7.6
Business enterprise	22.7
Consumer credit	11.3
Education	0.4
Fisheries	1.3
Land	5.8
Housing	34.6
Refinancing	7.9
Total percent	99.9
Total	$15,315,532

Technical Assistance

The technical assistance and agricultural advisory services available to Indian farmers is supplied through a cooperative BIA/USDA effort. Under a memorandum of understanding between the Extension Service and the BIA, the Extension Service provides leadership and direct assistance to State extension services in planning, conducting, and evaluating extension programs in those States where the BIA has contracts with State extension services. Funds for this work are transferred directly from the BIA to the State extension services.

However, USDA officials have complained that the actual amount of technical assistance and advice provided to Indian operators has declined in recent years because the BIA is reluctant to seek increased appropriations. The BIA extension budget has remained small and virtually constant since 1971.

TABLE 6.—*Extension Service BIA funds directed to State extension service*

1971	$1,748,331
1972	1,877,232
1973	1,732,737
1974	1,695,020
1975	1,709,633

Source: USDA.

The nature of fiscal funding makes job security uncertain for extension agents. This affects the quality of personnel that work in the program. For most, it is a temporary job. USDA would prefer direct appropriations. This would increase the level of funding and promote job security. Ultimately, the funds should be given directly to the tribe so that they may contract with those who will supply the best technical assistance.

RECOMMENDATIONS

The Commission recommends that:

1. Tribes be encouraged to develop comprehensive plans for long-term economic development premised on maximum Indian utilization

of Indian-owned resources. Recommendations for appropriation of grant moneys to tribes for planning purposes appears in chapters 5 *and 6 of this report.*

2. Congress enact legislation which will facilitate tribes in acquiring consolidated land areas sufficient to support efficient farm and cattle industries, Specifically, Congress:

a. Amend existing Federal laws relating to leasing of individual trust allotments to provide that tribes have a "first right of refusal" on leasing of such lands.

b. Elsewhere in this chapter it is recommended that Congress establish a special fund for the purpose of aiding tribes in programs of land acquisition and consolidation. In addition to use of these funds for outright acquisition of ownership, tribes be authorized to draw from this fund in order to acquire leasehold rights in individual allotments. Such authorization must be designed to accommodate the special credit needs of individual allottees which cause them to annually renegotiate what purport to be long term leases.

3. The Bureau of Indian Affairs revise its policies regarding leasing of agricultural lands in the following respects:

a. Rental terms correspond to general lease terms of comparable grade lands held by non-Indians in the surrounding area. Where practicable rentals should be premised on percentage of crop values rather than fixed rates per acre.

b. Leases contain strong conservation requirements with penalty provisions adequate to assure compliance by lessees.

c. Leased properties be inspected as frequently as necessary to insure compliance with lease terms.

d. Tribes be encouraged to contract with the BIA to perform inspection and enforcement duties.

4. The BIA and the tribes develop long-term range management plans to realize the potential benefits of a renewed, high producing grazing range. These plans provide for: (1) range and soil inventories to determine current range capacity; (2) timetables for adjusting herd size to capacity; (3) grazing permit systems; (4) development and prudent use of range improvements to raise the carrying capacity; and (5) education programs to promote good range management practices.

In addition, these plans evaluate the short term economic impact which diminishment of herds will cause to individual Indians during the period necessary to regenerate such rangelands. A program similar to the past "Soil Bank" program should be instituted to provide incentive to individuals to reduce their livestock holdings.

5. The Bureau of Indian Affairs implement programs necessary to provide technical assistance and training to tribal people to aid them in adopting modern farming and range management. Specifically, the BIA:

a. Review its funding requests for support of State extension Services and seek additional funds for this purpose as appear necessary.

b. Develop vocational education programs to be offered at the reservation level to train adults and students at the secondary educational level in techniques in agriculture, range management, and other subjects relevant to natural resource development.

6. Congress hold oversight hearings to ascertain the adequacy of the current funding level of the revolving loan fund for purposes of agricultural and livestock development.

TIMBER

ECONOMIC POTENTIAL FOR TRIBAL DEVELOPMENT OF TIMBER RESOURCES

Timber has the potential for being one of the most important Indian resources for development of reservation economies. Unlike mineral resources, timber is a renewable resource, and, therefore, can contribute indefinitely to tribal revenues. Excluding Alaska, the total standing timber inventory in Indian country is estimated at 40 billion board-feet.

Indian forestry lands are the largest private holding of forested and commercial forest land in the United States. One-fourth of all Indian lands are forested, and 10 percent of all Indian lands are commercial forest lands.[39] Timber contributes from 25 to 100 percent of tribal revenues for 57 reservations; more than 80 percent on 11 of these reservations. Income from stumpage (standing trees) alone for 1974 was $73 million.

Nevertheless, at present the potential yield of Indian timber lands is not being achieved. It is estimated that the $73 million derived from stumpage sales was 20% less than could have been obtained if harvesting had matched the annual allowable cut (AAC). In some areas harvesting on Indian lands was 65 to 75 percent below annual allowable cut. It is estimated that between 1970 and 1974 the dollar loss to tribes from insufficient logging was $25,486,767.

This problem is compounded by the fact that the BIA has failed to implement reforestation and precommercial thinning programs for many tribal forests. (See discussion, infra.) If the AAC is not adjusted for those tribal forests affected, it will inevitably (and soon) deplete the resource. Ironically, the BIA, by its inflexibility, fails in both respects by setting the AAC too low for some forests and too high for others.

An examination of the situation on the Quinault Reservation in the State of Washington provides a classic insight into the revenue potential of timber to Indian people, and a textbook study of the problems of maximizing timber revenues and providing sound forest management. The annual allowable cut on the Quinault Reservation is 200 million board-feet. Actual harvest in 1975 was only 122 million board-feet. The Quinault estimate that a properly managed forestry program would yield for stumpage alone an income of $22 million in 1976 prices for the Quinault Tribe. Development of tribal forestry management capabilities, logging operations, sawmills, and manufacturing plants using sawmill products would generate 1.800 jobs in the timber industry alone. It is estimated that for every job in the timber industry, 1.8

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[39] U.S. Cong., House, "Department of the Interior and Related Agencies Appropriations for 1977," hearing before a subcommittee of the Committe on Appropriations, part 6, Mar. 3, 1976, p. 150 (94th Cong., 2d sess.).

jobs are established in related industries. Maximization of the Quinault timber industry would thus translate to some 5,360 jobs throughout the Quinault region, clearly benefiting both Indian and non-Indian alike. Total value of economic activity generated would be in excess of $270 million. These figures and the fact that timber is a renewable resource indicate the tremendous potential for economic development that Indian forestry offers.

However, unless proper forest management techniques are instituted immediately, the long-range potential of this most important tribal resource is in serious jeopardy. In a special study submitted to the Commission, the Quinault tribal forest manager predicts that timber harvests on that reservation could plummet from 140 to 160 million board-feet to 5 to 20 million board-feet by 1986.[40]

BIA MANAGEMENT OF INDIAN FORESTRY [41]

The trust responsibility of the Federal Government for Indian forest resources is administered through the BIA forestry program. GAO reports have established the fact that the trust responsibility has not been diligently and effectively carried out. "Indian forest lands are managed less intensely than the Government manages its own national forest properties and compare even more poorly with management of industrial tree farms," Chief Forester Wilcox stated in a 1970 interagency memo. This observation is clearly supported in a field study reported in a 1975 GAO report comparing forestry management practices at the Wenatchee National Forest with those on the neighboring Yakima Reservation in the State of Washington. A 1973 GAO study stated that the Bureau does not adequately:

1. Determine annual harvest volumes;
2. Update timber management plans for reforestation and stand improvement;
3. Obtain information required to minimize the impact of timber harvesting and road construction on other forest resources.

A 1975 GAO report to the Senate Interior Committee [42] reiterated the same points of the 1973 report, as well as others, concluding that the Bureau has not adequately:

1. Increased the volume of timber harvested to the level permitted under the principles of sustained yield.
2. Improved the effectiveness of precommercial thinning and reforestation programs.
3. Performed commercial thinning.
4. Harvested adequate levels of dead and dying timber.
5. Established specific goals and action plans for identifying and accomplishing needed forest management work.
6. Made substantial effort to acquire the personnel and funds needed to fully manage the Indian forest.

Thinning and reforestation are essential to the maintenance of commercial forest. In 1973, "thinning accomplishments for all reservations equaled only about 3 percent of the total amount of pre-commercial thinning needed (backlog) and the reforestation accomplished equalled only about 4 percent of reforestation need." (GAO study.) The BIA has 173,365 acres needing reforestation and 738,593 acres needing timber stand improvement. This backlog is growing at a rate of 7,000 acres per year.[43]

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[40] Tim LaFrance, "A Case Study of Land Management and Land Use Planning on Quinault Indian Reservation", a special report to Task Force No. 1, American Indian Policy Review Commission, Washington, D.C. Summer 1976.

[41] GAO, "Indian Natural Resources: Opportunities for Improved Management and Increased Productivity, part I, Forest Land, Rangeland, Cropland, Aug. 18, 1975, pp. 1, 11, 27.

[42] Ibid., at pp. 9, 19, 22, 24.

The 1975 GAO report criticizes the Bureau programs for harvesting of dead and dying timber in the following terms:

> On the Colville Reservation, 47 MBF, which is equal to 39% of the AAC harvest, dies annually and on Yakima, 12 million MBF dies annually. The Bureau has no program for systematically harvesting this timber, and therefore, a large volume is not harvested and deteriorates to the point where it can no longer be used.

The actual economic loss is not projected, but clearly it is significant. Harvest management under BIA does not follow basic principles of revenue maximization.

Contrary to the most respected principles of good forest economics, the Bureau policy favors equal annual harvests irrespective of market prices. Logically, more timber should be harvested when prices are high, less when they are low as long as one attains within a single decade the optimal timber cut for forest growth as determined by a computerized timber management program. Added to the fact that the BIA sets equal timber cuts irrespective of market prices, the BIA is unable to accurately calculate the "annual allowable cut" because of its reliance on two old and simple formulas to determine what cut is "allowable." The formulas make no use of economic concepts such as the rate of interest, transportation costs, the price of timber relative to other goods, or the value of land in alternative uses. Instead, the BIA used a predicted future growth rate of the forest. But, the BIA's predicted rates for cutover land are invariably higher than actual rates because they are predicated on the assumption that the Bureau will provide expert management. Yet, by its own admission during appropriation hearings, BIA is not completing the forest management tasks it has set for itself.

Another outdated BIA practice is the method for adjusting stumpage prices. During the timber sale period, changes in lumber prices should, by normal competition, cause stumpage prices to change. The BIA tries to adjust the stumpage prices using the Western Wood Products Lumber Price Index. The error in this procedure is that lumber scale and log scale are not the same any more. Technical progress and changing utilization standards have enabled mills to obtain more lumber per log than formerly. Currently, lumber scale is 1.3 to 1.5 times smaller than log scale. If the lumber price index rises by $10 there is an increase in revenue of $13 per thousand log scale to the mill if we take the 1.3 value. But under the BIA approach the stumpage adjustment formula figures the 50–50 split between mill and tribe against the $10 lumber price index. So the mill receives an additional $8, the tribe an additional $5, rather than the tribe and the mill each receiving $6.50.

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[43] Task Force No. 7, final report, AIPRC, at p. 54.

DEVELOPMENT OF TRIBALLY MANAGED FORESTRY PROGRAMS

The economic potential of Indian timber resources is very encouraging. Indeed, it is estimated that tribes with medium to large stands of timber have the capacity to achieve economic self-sufficiency based on their timber resources alone for, as cannot be overemphasized, timber is a renewable resource. With proper management and with the development of related industry, it can supply an economic base to certain tribes for the indefinite future. In addition, maximization of the Indian timber potential will benefit nearby non-Indian communities through related industries as well as the Nation through assuring continued supply of a resource which is in growing short supply.

A major problem confronting the development of proper forest management programs is that of individualized ownership of Indian lands, and particularly the problems associated with fractionated heirship interests. This problem is more prevalent at the Quinault Reservation than others. Individual parcels of trust land are subject to long-term timber contracts which do not require reforestation or conservation practices, and which do not assure a proper return on the value of the timber harvested. In matters of fractionated heirship, a further complication arises from the fact that many heirs issued to the BIA open-ended powers-of-attorney which authorize the BIA to enter into leases of their lands for the indefinite future. Many of these powers-of-attorney are quite old, the number of heirs is substantial, and terminating these documents by having the original grantor rescind them is difficult if not near impossible.

The need to develop a comprehensive forestry management program for Indian country is obvious. It is vitally important that this program center around tribal control and management. BIA administration is hampered by lack of goals and objectives in forestry development. This deficiency indicates that the BIA has no cohesive approach to forestry management. It is also not in the position to manage all the tribes' resources within their varied ecological contexts. Only the tribes should determine their goals and only the tribes can oversee the exploitation of all reservation resources with due consideration for external efforts. The BIA does not have the direct interest in the enhancement of tribal resources which tribal members have. Due to the poor reputation of BIA forestry and the lack of opportunity for advancement, it is almost impossible to recruit highly qualified personnel to Bureau forestry management. A vicious circle of poor performance results is perpetuating tremendous losses for tribes as timber resource owners which results in perpetuating a dependency economy.

Training in more technical aspects of forestry development could be offered in tribal or intertribal technical schools and community colleges. Tribal members must be encouraged to concentrate on scientific and technical subjects of immediate use to the tribe when they pursue advanced degrees.

The tribes need to develop a timber industry, not just a logging operation. This would include growing timber as well as development of processing facilities, but would have to recognize the importance of maintaining competition for Indian timber if dollar benefits are to be maximized. Total restriction of timber operations to tribal enterprises can cause a decrease in stumpage value which, in turn, could result in lowering of income to tribes. In addition, denial of access to private enterprises may result in cutting off Indian access to private expertise.

A special task force should be formed comprised of experts in the areas of forest management to evaluate the present BIA forest management program and develop a modernized comprehensive forest management program for the future use of the Bureau and the tribes. The members of this task force should be drawn from the public and private sectors of the forestry industry and should include timber managers of Indian tribes and the BIA.

RECOMMENDATIONS

The Commission recommends that:

1. In order to clarify the legal authority for Indian tribes to regulate, manage, and sell their own tribal resources, Congress amend: 25 U.S.C. 406—Sale of Timber on Lands Held in Trust; and 25 U.S.C. 407—Sale of Timber on Unallotted Lands.

25 U.S.C. 406 Sale of Timber on Lands Held Under Trust

Amend sec. 406(a) by inserting a period after Interior in line 3 and striking the remainder of the sentence and the following sentence.

Amend sec. 406 by adding a new paragraph at the end of the section as follows;

> (g) Bonds for performance and reclamation pursuant to contracts under this section may be required by the Secretary or the owner of the timber in accordance with provisions under Sec. 407.

25 U.S.C. 407 Sale of Timber on Unallotted Lands

Amend sec. 407 by designating the present section as paragraph (a). In line one after "sold" insert "by authority of the tribal council with approval of the Secretary of Interior". In line four insert a period after Interior and delete the remainder of the paragraph. At the end of the paragraph insert a new sentence: "Regulation of timber sales under this section and sec. 406 may be superseded by regulation pursuant to tribal constitution, charter, or ordinance, provided that such regulation is not inconsistent with the provisions of this section."

Amend sec. 407 by adding a new paragraph (c) to read as follows:

> (c) Nothing in this section shall prevent the adoption by the tribal council of regulations for the management of natural resources within reservation, and after such regulations have been approved by the Secretary of the Interior they shall be controlling and regulations by the Secretary of the Interior under this section which may be inconsistent therewith shall no longer be applicable.

2. To resolve the difficult problems in management in the continuing waste of Indian timber resources occurring because of the fractionated heirship pattern of ownership of forested allotments Congress amend existing Federal law relating to:

(1) Sale of timber on trust allotments to provide a first option to the tribes.

(2) Authority to the tribe to acquire existing powers of attorneys now held by the BIA upon a showing that the affected allotted lands have been included in a comprehensive tribal forest management plan.

3. The BIA make a study of its existing forest management practices and regulations.

A special task force be formed comprised of experts in the areas of forest management to evaluate the present BIA forest management program and develop a modernized comprehensive forest management program for the future use of the Bureau and the tribes. The members of this task force should be drawn from the public and private sectors of the forestry industry and should include timber managers of Indian tribes and the BIA.

4. In order to provide for reforestation and regeneration of the millions of acres of Indian forest which have been clearcut by private companies under sales contracts approved by the BIA, the Congress appropriate funds to enable those tribes affected to undertake the necessary regeneration and reforestation programs.

5. Congress enact legislation to permit tribes to contract with private enterprises or the Forest Service for timber management.

WATER RESOURCES

The survival of Indian tribes as economic units in the arid and semiarid Western States requires the protection and enforcement of their water rights. The importance of water to the Indians has been well stated by Senator Kennedy:

> (to) American Indians, land and water have always led the list of those matters deemed essential for both present livelihood and future survival. For Indians know that any threats to or diminution of their land and water rights may constitute threats to their very existence.[44]

A formidable body of law favorable to the American Indian people has been developed which, if properly administered and applied, will protect the Indians against divestiture of their water rights. In the past, however, these rights have been neglected and violated, thereby stifling tribal goals of self-sufficiency through economic development.[45]

INDIAN WATER RIGHTS

Indian water rights were recognized by the Supreme Court in the landmark case of *Winters* v. *United States*, from which emanates the body of law commonly referred to as the *Winters* doctrine.[46] That doctrine holds that the Indians have prior and paramount rights to all water resources which arise upon, border, traverse, or underlie a reservation in the amount necessary to satisfy the present as well as future needs of the Indian reservations.

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[44] Vol. 122, Cong. Rec., p. S6339, May 3, 1976, 94th Cong., 2d sess.

[45] For a good discussion of Indian water rights, see Educational Journal, Institute for the Development of Indian Law, vol. 2, Nos. 5, 7, and 8. "The Indian Water Wars" by Steve Nickeson.

[46] *Winters* v. *United States*, 207 U.S. 564 (1908).

Winters rights are owned by the Indian tribes and should, therefore, be distinguished from other federally reserved rights. The only role of the United States is that of a trustee for the tribe. This was precisely the point of the decision in *Winters* v. *U.S.* the lead case on the subject:

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastor and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically value-less. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

The contention that these rights were given up by the Indians was firmly rejected by the Court.

In applying the *Winters* doctrine, it is important to note that rights to the use of water in the Western States are interests in real property, having all the components of a freehold estate.

The doctrine of "prior appropriation" governs water use in most Western States. The extent of the water right is determined by the amount of water actually put to use and the date when that use first commenced. The significance of the *Winters* doctrine is that neither of these criteria are applicable to the determination of Indian water rights. Not only do their rights predate those of the non-Indian users, they are open-ended rights not limited to amounts already put to use, but rather are dependent upon the future needs of the tribes.

The priority date of the Indians' *Winters* doctrine rights to the use of water is of vital importance. For example, on the tributary streams of the Upper Missouri River Basin, such as the Milk River, the Big Horn River, the Tongue River, and others, the demands for water far exceed the available supply, thereby resulting in a gross overappropriation of those streams. Consequently, the priority rights of the Blackfeet, the Fort Peck, the Wind River, the Crow, and the Northern Cheyenne Indian Tribes in the States of Wyoming and Montana are gravely imperiled unless their full priorities are protected.

The priority date of the Indian water rights may depend on whether the reservation was created by treaty or Executive order. Where a reservation was established by treaty, as in the *Winters* case, the tribes impliedly reserved the right to all the water necessary to fully develop their reservations, and arguably these rights date from time immemorial. A different situation may exist with respect to Executive order reservations, where title was returned from the United States to the Indians. For these reservations, the priority dates governing the Indians' *Winters* doctrine water rights are determined as of the date the reservation was created. It should be noted, however, that *Winters* rights for treaty and Executive order reservations have equal dignity and are not subject to appropriation by the State.

In the years following the *Winters* case, many cases arose in which the Circuit Courts of Appeal applied the *Winters* doctrine for the purpose of protecting the Indians' water rights. In *Conrad Investment Co.* v. *United States*, the Ninth Circuit Court of Appeals relied on that doctrine as its basis for holding that the Blackfeet Tribe in Montana possessed water rights in a river bordering its reservation in amounts sufficient to meet their future needs of irrigation and other useful purposes.[47] That same court reached a similar conclusion in *United States* v. *Walker River Irrigation District*, involving Indian claims to a stream which flowed across its reservation.[48] In that case, the court emphasized the following:

> The power of the Government to reserve * * * water (to Indian tribes) and thus exempt (such waters) from subsequent appropriation by others is beyond debate.[49]

Courts have also established the criteria governing the amount of water which may be reserved by Indian tribes. In *United States* v. *Ahtanum Irrigation District*, the Court of Appeals for the Ninth Circuit addressed the question of the amount of waters reserved and held the amount to be that which is necessary to meet the Indians' "present and future water requirements".[50] The Supreme Court elaborated upon this general rule in the more recent and vitally important case of *Arizona* v. *California*.[51] In addition to reaffirming the *Winters* doctrine, the Court in that case held that the standard of measurement to be used in determining the Indians' water rights should be the amount of water necessary to * * * irrigate all the practicably irrigable acreage on the reservations." [52]

Despite this well-established body of law favorable to the Indian, there is a continual challenge to their *Winters* rights by the Federal Government, the States, corporate and municipal entities, and non-Indian landowners. Great political concern and hostility toward Indians and their rights is frequently engendered as Indians assert their legal claim against State and local water interests.

VIOLATIONS OF INDIAN WATER RIGHTS

A formidable body of law protects the Indians' water rights, and proper enforcement and application of the law should preserve these rights. However, as evidenced by the following cases, the Interior and Justice Departments have often in the past been lax in enforcement of these rights and have not infrequently adopted adverse positions, contributing to the erosion of the Indians' water rights.

For example, in *Colville* v. *Walton, et al*, a case initiated in 1970 by the Colville Confederated Tribes of Washington, the Justice and Interior Departments intervened and adopted a position adverse to that of the Colvilles. In essence, the Department claims the Secretary of the Interior has exclusive jurisdiction over the water resources on the Colville Indian Reservation and therefore has the right to control all allocation of water within the reservation and apparently the duty to allocate the water to non-Indian users on the same basis as it is allocated to Indian users. The authority relied upon for the claimed "exclusive jurisdiction" is 25 U.S.C. sec. 381. That statute states that the Secretary of the Interior may, when water is required for irrigation on an Indian reservation, promulgate rules and regulations "to secure a just and equal distribution" of the available water among the

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[47] *Conrad Investment Co.* v. *United States*, 161 Fed. 829 (9th cir. 1908).
[48] *United States* v. *Walker River Irrigation District*, 104 F. 2d 334 (9th cir. 1939).
[49] Ibid., at 336.
[50] *United States* v. *Ahtanum Irrigation District*, 236 F. 2d 321, 326 (9th cir. 1956).
[51] *Arizona* v. *California*, 373 0.2 546 (1963).
[52] Ibid., p. 600.

"*Indians residing upon such reservation.*" [Emphasis supplied.] This case has now been pending for some 7 years. Recently Justice asked and the Court granted a 1-year extension of time, thus delaying even further the efforts of the tribe to adopt their own water code. The Justice Department has now asserted the same argument in the *Bel Bay* case now pending in the western district of the State of Washington.

The Government is also asserting paramount authority over Indian water rights in the Upper Missouri Basin in matters involving sale of water. This captured the attention of Congress which held comprehensive hearings regarding efforts of the Secretary of the Interior and the Corps of Engineers to invade the Indians' water rights.[53] In all, the Secretary of the Interior has entered into contracts for the sale of approximately 712,000 acre-feet of water of the Big Horn River and its major tributary, the Wind River. Without those water resources, both the Crow and the Wind River Tribes will be denied any possibility of economic growth.

The Rights Are Legally Adequate to Meet the Future Requirements of the Indian Communities

In the above cited *Ahtanum* decision involving the *Winters* rights of the Yakima Indian Nation, the issue arose as to the method to which there should be adherence in measuring the Indian rights. On the subject, the Court said:

> This brings us to a discussion of the question of quantum of waters reserved. It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made.[54]

These succinct terms used by the Court in this most pertinent declaration:

> The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable.

It was then that the Court in these terms reiterated and reaffirmed this basic tenet of the *Winters* doctrine, as enunciated in the carrier *Conrad* decision: "The lands within these reservations are dry and arid, and require the diversion of waters from the streams to make them productive and suitable for agriculture, stock raising, and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the Government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case." [55]

There was thus established the important criteria which contemplates a supply of water for the Indian needs to meet their then and future water requirements. In 1960, those criteria, which had been applied to treaty reservations in *Winters*, *Conrad*, and *Ahtanum*, were intensely and extensively reviewed by the Special Master appointed by the Supreme Court. On the nature, measure, and extent of Indian *Winters* rights to the use of water, the Court had this to say in approving the report of the Special Master in regard to the *Winters* doctrine and its application to future water requirements:

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[53] Hearing on the sale of water from Upper Missouri River Basin by the Federal Government for the development of energy, before the Subcommittee on Energy Resources and Water Resources of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st sess., pt. 1 at p. 10 (1975, hereafter referred to as Sale of Indian Water).

[54] *United States* v. *Ahtanum Irrigation District*, 236 F. 2d 321, 326 (CA 9—1956).

[55] *Conrad Investment Co.* v. *United States*, 161 Fed. 829, 832 (CA 9—1908).

> We also agree with the Special Master's conclusion as to the quantity of water intended to be reserved. * * * the water was intended to satisfy the future as well as the present needs of the Indian Reservations * * *.[56]

There have thus been established by judicial precedent these aspects of great importance in the application of the concepts of the Indians' *Winters* doctrine rights to the use of water:

(*a*) They underscore the great need for water;

(*b*) They underscore that need is for present and future Indian requirements; and

(*c*) They underscore the intention that the Indian reservations are to be continuing, viable, economic communities utilizing the necessary quantities of water to achieve those precise and most desirable ends.

Indian and State Relations Involving Indian Winters Doctrine Rights: The Akin Decision

The *Akin* decision epitomizes the conflicts of interest that pervades Federal protection of Indian resources. In that case the Department of Justice sought a "determination of water rights * * * as trustee for certain Indian tribes and as owner of various non-Indian government claims."[57] The Justice Department is purported to represent claims of the United States which are necessarily in conflict with the *Winters* doctrine rights of the Indians there involved. As has been reviewed, the Indian rights and those of the Federal Government are vastly different. Indian rights are private in character, retained by the tribe, or granted to the tribe for its exclusive use and benefit.[58]

Substance of the issues in *Akin* is that the Congress of the United States subjected the Indian *Winters* rights to the use of water to the jurisdiction of State courts and State tribunals for the determination and adjudication of those rights. By that decision, the Supreme Court made applicable to the Indian *Winters* rights to the use of water the so-called McCarran Act.[59] That ruling placed the Indian water rights within the jurisdiction of State courts.

In hearings before the U.S. Senate after the decision in the *Akin* case, Mr. Peter Taft, Assistant Attorney General of the United States, testified as follows:

> Supreme Court cases, as much as 100 years ago, have noted the fact that there has been a historic hostility between the States and the tribes and that, indeed, it is the Federal interest that has protected the tribes wherever they may be. * * *
>
> I would like to point out also, a difficulty we have in keeping uniformity of interpretation of Indian rights. There are probably 15 or more States in the West. If Indian rights are to be adjudicated in the State courts, in effect you have the potential of 15 different interpretations.

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[56] *Arizona* v. *California*, 373 U.S. 546, 600 (1963).

[57] *Colorado River Water Conservation District et al.* v. *United States*, 74–940, 74–949; *Akin et al.* v. *United States*, 424 U.S. 803 (1976).

[58] See 1 Wiel, Water Rights in the Western States, p. 301.

[59] 43 U.S.C. 666.

Thus, the States have now been authorized to adjudicate one of the most heated and controversial issues dividing tribes and States. The one-sidedness of this arrangement is readily apparent to all and Indian water rights are truly now in serious jeopardy.

ECONOMIC DEVELOPMENT AND UTILIZATION OF WATER RESOURCES [69]

The purpose here is to chronicle the importance of water to tribal existence.

Survival for the American Indian ultimately boils down to the relationship he bears to the lands to which he has been confined. White Americans have always moved to new locations once the resources were exhausted. Not so with the Indians—the maintenance of viable tribal structures and cultures is geared directly to the land base and the development and utilization of their resources contained therein.

The demands of national energy and the scarcity of water supply are closing in on the American Indians at a rate which heightens the need for protective legislation that, as applied to Indians and their water rights, will sufficiently embrace Indian intangibles. To the fullest extent possible, development should recognize a role for the special identification Indians have with their land, water, and related natural resources.

History bears testimony to Indian use of water for sustenance as they shaped their lives to the demands of the varying environments. When an indigenous people called the Hohokams occupied lands in the Gila and Salt River Valleys over 2,000 years ago, they diverted water by means of canals which even now are recognized as highly refined engineering accomplishments. They long ago demonstrated that water applied to the land was essential if communities were to be maintained and to have more than a rudimentary culture. They demonstrated the need for economic development which they undertook as a means of survival.

Like the Arizona Indians, the Pueblos of the Rio Grande Valley adjusted to a desert environment by using water to promote agricultural development. Mohaves, Yumas, and Chemehuevi likewise adapted their lives to the surrounding desert by occupying lands on both sides of the Colorado River. In the "Great Colorado Valley," as early explorers referred to it, the soldiers and missionaries first encountered these Indians. Years later, Lieutenant Ives, in his 1858 explorations on the Colorado River, reports the Quechan Indians using water to raise their crops. Of the Mohaves, Ives said:

> It is somewhat remarkable that these Indians should thrive so well upon the diet to which they are compelled to adhere. There is no game in the valley. The fish are scarce and of inferior quality. They subsist almost exclusively upon beans and corn, with occasional watermelons and pumpkins, and are as fine a race, physically, as there is in existence.

Those Mohave crops were raised by the Indians who planted the lush river bottoms as soon as the perennial overflow had receded, thus using the natural irrigation furnished by the Colorado River. It goes without saying, that the importance of the rivers to the indigenous cultures throughout the Western United States was not limited strictly to agricultural purposes. For example, the Northern Paiutes, in the vast desert areas of the present State of Nevada, depended upon fish taken from Pyramid Lake and the Truckee River as a source of sustenance. This was long before the so-called "discovery" of that lake by Fremont in 1844.

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[69] Task Force No. 4, final report, American Indian Policy Review Commission, Washington, D.C., July 1976, p. 153.

Fisheries, to the Indians of the Pacific Northwest, "were not much less necessary to the existence of the Indians than the atmosphere they breathed." Salmon and other fish taken from the Columbia River were always an important item of trade among the Indians, as reported by Lewis and Clark. And, of course, rivers were not only the source of sustenance for the American Indians, but they were also the arteries of crude commerce and travel. Quite significantly, when transition from their traditional way of life was forced upon the western Indians, they relied upon their streams and rivers as a source of sustenance and the means to adopt the new ways of living. The Yakimas, in their transition from a nation given over largely to hunting and fishing, were the first in the State of Washington to undertake to irrigate their meager gardens.

A central factor in establishing and protecting Indian water rights is the beneficial use of it. Water is so essential to the economic development and social survival to the American Indian that, without it, there can be no development of self-sufficiency for a large percent of the Indian population.

Aside from the value of water in the development process, the monetary value of water is tremendous. For example, the fair market value of the 2,000 cubic feet per second that flows out of the Fort Hall Bottoms' lands is about $12 million. This is based on a price of $25 per acre-foot of water from April 1 to October 1, which is only the 6-month irrigation season. Large quantities of water arising on the Fort Hall Reservation are not utilized by members of the tribe, but are used by non-Indians off the reservation. It is illogical for the Shoshone-Bannock Tribes to be short of water because of a junior right in the Idaho canal when 2,000 cfs flow off their reservation 365 days a year. It becomes more illogical when one considers the fact that the major agricultural areas of the reservation are situated over the Snake River Plain Aquifer and are among the most productive lands in the world.[61]

In a report to the Committee on Interior and Insular Affairs of the Senate, the Department of Interior stated that most of the irrigation projects of the BIA were in need of completion accompanied by reservation rehabilitation improvement.[62]

Irrigated farming is the basic industry for many Indian communities, and for many, the only means of income available to the Indian people. There is great danger of loss of the water, if not put to beneficial use, because of the acute competition for water in the arid and semiarid regions in the West. This is particularly true in and adjacent to the Indian communities.

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[61] Jack Peterson, Futures, A Comprehensive Plan for the Shoshone-Bannock Tribes, 1974, p. 11.

[62] Report to Committee on Interior and Insular Affairs by Secretary of Interior, Thomas Kleppe, Mar. 10, 1976.

A short history of the community of Ak Chin would illustrate how the use of water can help Indian people develop a relatively self-sufficient community. Prior to 1910, their reservation had a river running through their land. That year, however, it was dammed upstream. The Federal Government gave "notice of water appropriation" for their use, which was never implemented. Up until 1946, the land was not used. At that point, the BIA started leasing it to the non-Indians. Just 16 years ago, the Ak Chin people were struggling along surviving on transfer payments in welfare from the Federal Government. Today, as a result of an incredible amount of effort on the part of the Ak Chin people and over the objections of the BIA, they are prospering. Their farming operations have done this for them.

However, even with this success, they are in trouble. Less then one-fourth of their irrigable land is now being farmed because of the short supply of water and the expense of pumping it. The water table is sinking at a rate of approximately 20 feet per year. There is a continuing need for water supply to the Ak Chin people.[63] Without water they will once again become dependent upon the Federal Government for transfer payments in the form of welfare and unemployment.

MANAGEMENT OF WATER DELIVERY SYSTEM [64]

On August 18, 1975, GAO reported to Congress a need for development of Irrigation Management Services (IMS) in the BIA's irrigation projects. The Bureau of Reclamation, the National Water Commission in its report, and various other studies concluded the IMS would allow a reduction in water use by increasing irrigation efficiency by approximately 20 percent annually at a cost of about $8 per acre. In spite of the benefits IMS offers, the BIA has not started such a program. They say that they have not explored the Bureau of Reclamation efforts to develop IMS and also felt that farmers would not cooperate in implementing such a program. Even at that, they felt that IMS was not needed on their irrigation projects.

In contrast to the BIA's position on IMS, such a program could increase the amount of land used for farming on the Yakima Nation. Of the 154,800 acres of cropland, productivity on 10,500 acres has already been adversely affected by a rising water table with approximately 300 additional acres being affected each year. The GAO report stated:

> A 1969 Bureau study estimated that annual rent for 2,282 acres of affected Yakima croplands could increase by $66,520, if the land were reclaimed. Furthermore, rental income could be expected to decrease if the present rate of land deterioration were allowed to continue. According to an agency official, some of this land was formerly used to grow hops and annually rented for over $50 an acre. Now, these same lands are suitable only as pasture and rent for about $2 an acre.
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> * * * An alternative to IMS on the Yakima reservation would be a drainage project to lower the area's water table. It would cost substantially more than

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[63] Letter to Ernie Stevens, staff director, Senate Select Committee on Indian Affairs, from Forrest Gerard and Assoc., re: proposed legislative concept to solve Ak Chin's imminent water needs, Mar. 9, 1977.

[64] U.S. Comp. Gen., report to Senate Committee on Energy and Natural Resources, Indian Natural Resources—Opportunities for Improved Management and Increased Productivity Part I: Forest Land, Rangeland, and Cropland, Aug. 18, 1975, p. 50.

IMS, however. During 1970 and 1971, 934 acres were drained at about $125 per acre. A Bureau official estimated current drainage cost to be nearly $200 per acre.

The report also stated that, of the 50,500 acre Gila River Reservation portion of the San Carlos Irrigation Project, only 13,083 acres received water. The agricultural value of these lands to the tribe is very important. These lands that are receiving water produced approximately $4.4 million worth of agricultural products. The BIA's efforts are geared toward finding additional water for the tribe even though they believe that IMS would stretch existing water supplies to irrigate substantially more of the croplands. In spite of the BIA's belief that tribes would be reluctant to accept IMS, GAO found that:

> In 1973, the tribe, Bureau, and BR entered into an agreement to implement IMS on the Colorado River Irrigation Project.
>
> Bureau officials stated that the tribe encouraged IMS because almost all of its available water was being used on 62,000 acres out of 103,000 acres of irrigable lands. IMS has the potential to stretch existing water supplies to an additional 28,000 acres of reservation land by 1978.

The survival of Indian tribes as economic units in the arid and semiarid Western States requires the protection of Indian rights to water on, under, and adjacent to Indian land.

The development of viable agricultural systems, grazing economies, or industrial ventures depends on adequate, reliable delivery of water from customary sources.

> Economic development of the western reservations is inseparable from Indian rights to the use of water, which, in turn, are the most valuable of all the natural resources in the arid and semiarid regions. Those rights are the catalyst for all economic development. Without them, the reservations are virtually uninhabitable, the soil remains untilled, the minerals remain in place, and poverty is pervasive. (Veeder, 1972, p. 175).

Indian water rights are inherent and reserved to tribes through treaties and agreements and are not derived from Federal grant, appropriation, or purchase. The trust responsibility of the Federal Government includes the protection of Indian rights to the use of water.

The States and the Federal Government have ignored established Indian water rights under the *Winters* doctrine, in Federal water projects.

The Government also fails in its trust responsibility by not protecting Indian rights to the use of water from infringement by non-Indian individuals and the States.

At present, there is no program or systematic approach by the Department of the Interior or by the BIA to develop tribal water resources. The responsibility has been put upon the tribes themselves to protect their water rights, but many tribes lack the expertise or the funds to employ experts in this field. In addition, the Department and the BIA do not provide information to the tribes as to the intent and impact of projects of the Bureau of Reclamation, Bureau of Land Management, Corps of Engineers, etc., which have an interest in water resources affecting Indians. This once again is an example of the conflict of interest within the Department of the Interior.

In several suits now pending before the court, the Department of Justice, while claiming to represent the Indian claimants, is arguing a position contrary to the interests of Indian water rights.

The Bureau of Reclamation has presented to Congress data on water recovery in several cases which is factually incorrect. The effect has been the violations of water rights of the tribes involved who have found their access to customary sources of water diminished.

RECOMMENDATIONS

The Commission recommends that:

The Secretary of Interior allow the tribes having legal rights over water to develop their own water codes designed to regulate all forms of water usage.

Congress enact legislation to provide for an Indian trust impact statement (as outlined in trust section of this report) any time Federal or State projects affect Indian water resources.

The Secretary and the Bureau of Indian Affairs take the following actions or provide tribes with the financial capability to:

1. Inventory all tribal water resources.
2. Complete land use surveys particularly to determine lands which are irrigable or which can use water for other beneficial uses.
3. Conduct adequate engineering studies of the Indian water resources necessary for litigation.
4. Make available to the tribes funds to conduct legal and engineering research regarding particular water resources and to proceed with litigation where necessary.

Congress investigate litigation in the San Juan River Basin, the Rio Grande Basin, and the Colorado River Basin, and it likewise investigate the *Walton* cases, the *Bel Bay* case, and the *Big Horn* case to ascertain the scope of Federal conflicts of interest.

Congress amend 42 U.S.C. 666 known as the McCarran amendment to specifically exclude Indian water rights from its provisions.

The Secretary of the Interior direct the BIA to work with Indian tribes and the Bureau of Reclamation to (1) identify those Indian lands served by BIA irrigation projects which would most benefit from IMS; and (2) plan and provide guidance to implement IMS on those lands.

MINERAL RESOURCES

There has been a considerable amount of criticism about the leasing practices of Indian mineral resources. A majority of the criticism is aimed at the manner in which the Federal Government manages these resources. Well-documented arguments have been made which point out that the development of the non-Indian community has been, in many cases, paid for by the Indians through their resources. Much has been said about the source of the problem. The effort here is to point out the difficulties and recommend a set of policies to design and correct these unfortunate circumstances. It would be helpful to briefly discuss some important data on the amount of resources we are referring to.

In a report to the Senate Committee on Energy and Natural Resources (then Interior and Insular Affairs), March 31, 1976, the General Accounting Office (GAO) stated that Indian oil and gas reserves amount to approximately 3 percent of the United States total reserves. This was broken down into 40 reservations in 17 States. The estimate on oil reserves as of November 1973, was approximately 4.2 billion barrels with gas resources at about 17.5 trillion cubic feet. There was also an estimation of approximately 100–200 billion tons of identified coal reserves located on 33 reservations in 11 States. This was approximately 7–13 percent of the United States identified coal resources of 1.581 billion tons.[65] In a report by the Federal Trade Commission that Indian lands have the potential of containing more than one-tenth of the United States currently minable coal reserves.[66] A brief review of the relative importance of Indian minerals to production in the United States would also prove helpful. Data gathered from a USGS survey shows that production of coal on Indian lands in 1974 was 1.9 percent of all United States production which made up 35.8 percent of all production on Federal and Indian lands The value of production of oil and gas on Indian lands was 4.4 percent of the total United States production. If off-shore leases are excluded, the production value rises to 13.6 percent of the total production value on all Federal and Indian lands. Aside from the major Indian energy resources, there are a variety of other minerals of considerable value on Indian lands. For example, phosphate production on Indian lands was 4.9 percent of the total United States production which amounted to 35.4 percent on Federal and Indian lands. In 1974, 100 percent of the Federal and Indian land uranium production was on Indian lands. It must be noted that of all mining on Federal and Indian lands, production from Indian held resources was 15.6 of the total.[67]

INEQUITABLE MINERAL LEASES

The present policies on the leasing of Indian resources leave tribes with inequitable agreements. These agreements ensure that revenues received from mineral resources are only a fraction of what they should be. Measured by international standards, the leases negotiated on behalf of Indians are among the poorest agreements ever made.[68]

DEFICIENCIES IN CONTRACTS

One of the major deficiencies in Indian lease agreements is that royalty rates are usually too low and fixed in dollars per unit of production of the resources which, of course, ignores increases in value rather than percentage of value, which increases income as minerals increase in value. In four out of the five Navajo coal leases consummated between 1957 and 1968, the royalty was fixed between $0.15–$0.375 a ton. Since then, the average value per ton of coal rose from $4.67 (1968) to $18.75 (1975).[69] There is no simple way to change these inequitable terms because there are no adjustment clauses in the leases, and the leases are for 10 years "and as long hereafter as minerals are produced in paying quantities." The royalty is arguably fixed for the life of the deposit. Some tribes have attempted to negotiate royalty rates in spite of the BIA written leases. The Crow Tribe was successful in forcing the rate of coal from the originally offered 11 cents per ton to 17.5 cents per ton. As a general principle, in a line of inflation, a fixed price contract for any commodity is a poor contract. Even if the relative price of a commodity does not rise in relation to all other goods over time, the general rise in the price level will hurt tribes with fixed rates per ton rather than percentages of value.[70] In a review of 15 coal leases from 3 tribes, 12 had fixed royalty rates while only 3 had royalty rates based on the selling price of the coal. Although USGS, in 1971, changed its policy of calculating royalties based in fixed amounts per ton to percent of selling price, they approved royalty rates for leases at 17.5 cents per ton without recommending percentage royalty rates.[71]

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[65] Task Force No. 7 final report, AIPRC, Washington, D.C., July 1976, p. 47.

[66] FTC, Bureau of Competition, 1975 "Report to the Federal Trade Commission on Mineral Leasing Indian Lands," staff report, James Dick, primary author, October 1975.

[67] Supra, note 1, p. 47.

[68] David N. Smith and Louis T. Wells, Negotiating Third World Mineral Agreements: Promises at Prologue, Cambridge, Mass.: Ballinger Publishing Co. (1975).

[69] Executive Office of the President, Council on Wage and Price Stability, A study of Coal Prices, a staff report, Mar. 16, 1976, p. 37.

COAL LEASE ACREAGE LIMITATION

In reviewing 15 leases, it was discovered that 10 were in excess of the 2,560-acre limitation mandated by 25 CFR § 171.9(b) and § 172.13. Decisions on size of leases must be determined by the tribes. It is noted that for coal development to be profitable the size of the lease has to be greater than 2,560 acres.[72] It appears that a review of the acre limitation must be done.

ENFORCEMENT OF PROVISION OF CONTRACTS

The BIA and USGS are charged with the responsibilities of enforcing Indian mineral lease provisions. There is considerable documentation that such enforcement is not taking place. There has been a failure to require full compliance with information provisions of exploration permits. The USGS has the responsibility of performing gas and oil well site inspections for lease compliance. The inspections include drilling, producing, abandonment, and meter proving inspections. It has been found that only a very small percentage of required inspections is being carried out.[73]

It has been found that significant amounts of royalty payments were being received late. In fact, of the survey that was performed, only one tribe was properly enforcing its lease provisions adequately. A comparison of royalty payments on the Osage, Uintah and Ouray, and Jicarilla Reservations for a 3 month period in 1974 follows:

Reservation	Payments examined	Late payments	Percent late
Osage	4,824	13	0.3
Uintah and Ouray	60	42	70.0
Jicarilla	60	28	46.7

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[70] Ron Trosper, American Indian Mineral Agreements: Literature Search and Reform Proposals. A paper prepared for Task Force No. 7—Reservation and Resource Development, American Indian Policy Review Commission, Washington, D.C., May, 1976.

[71] U.S. Comp. Gen., report to Senate Committee on Interior and Insular Affairs, Indian Natural Resources—Part II Coal, Oil, Gas, Washington, D.C.: GAO, Mar. 31, 1976.

[72] Ibid., p. 24.

[73] Ibid., p. 31.

The loss to the tribes is significant. For example, in a review of 20 producing oil and gas leases done over a 14-month period on one reservation, it was revealed that over $270,000 in royalty payments were 1 to 11 months late. If the 1.5 percent late charge provision were enforced, it would mean that the tribe would receive an additional $6,000. That $270,000 invested for 1 year at a conservative 6 percent rate would have produced $16,200 additional income to the tribe.[74]

Enforcement of contracts requires reviews and audits of lessees. These requirements are not being performed. USGS regulations require lessees to submit reports which include reports of operations listing various actions. These reports, for the most part, are not being submitted. Many postaudits are not being performed. In one area of the review, only 5 percent of the past audits were being performed. The benefits of such audits are significant. In that same area, over a 2-year period, an additional $798,000 was collected through such audits.[75] The functions of reviewing and auditing require auditors and reviewers, which requires funds to be expended. In view of the fact that significant benefits can be received with adequate reviews and audits, it would be appropriate to put greater effort in this area.

Enforcement of lease provisions for hiring are to a large extent not done. The reason is that the tribes and the BIA are unable to determine the effectiveness of Indian preference in hiring provisions. Only in a few cases were there procedures which required the lessee to report on their employment of Indians in the Indian community. If procedures were established for enforcement of preference provisions, the tribes and BIA would better be able to determine the effectiveness of such provisions. Indeed, where such procedures were established, there was substantial Indian employment in the minerals industry, as was the case on the Navajo Nation where enforcement procedures had been established. In that situation of the 1,313 people who were employed in the coal industry, 712 were Indian. The total annual earnings, in that situation, were approximated at $8.2 million. In other cases, because accurate figures on the number of people employed were not available, it was not possible to determine the number of Indians employed in the mineral industry; however, indications were that Indian employment in the industry was minimal.[76]

ENFORCEMENT OF PROVISIONS FOR RECLAMATION

The tribes, BIA, State and local agencies, and USGS are all involved in reclamation activities on Indian lands. Monitoring of reclamation on Indian lands activities is the responsibility of USGS The responsibilities of USGS in this area are not outlined in the CFR, although they are discussed in various sections. There are no formal agreements among the different organizations to coordinate these activities. The result is that each organization is operating independently.[77]

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[74] Ibid., p. 32.
[75] Ibid., p. 34.
[76] Ibid., p. 18.
[77] Ibid., p. 37.

ENVIRONMENTAL CONTROLS ARE TOO WEAK

Indians are unable to prevent environmental degradation resulting from development except through the very cumbersome mechanism of the National Environmental Protection Act. NEPA's main contribution is to cause delay. A tribe may wish to control the form of development rather than to delay it; yet, without the opportunity to bargain effectively, the tribe cannot impose the controls it wants or extract a higher royalty in return for not imposing the controls.[78] It may be too early to know how much strength tribes can put in codes controlling development, particularly on leases which already have been signed.

THE DURATION OF LEASES ARE TOO LONG

Nearly all can be indefinitely extended if production is occurring. The provisions for redetermining the rental rates are usually weak. The extension provision results from the Omnibus Mineral Leasing Act of May 11, 1938 (25 U.S.C. § 396 a–f), which states that minerals may be leased "* * * for a term not to exceed ten years and as long thereafter as minerals are produced in paying quantities." The limit of 10 years is contradicted by the possible indefinite extension of time. Long-lived leases accentuate the low price problem identified earlier. In a time of general inflation, a fixed-price-per-ton payment can become a very small share of the total income from a particular mineral production activity. For percentage royalties, should the usual landowner's share drift upward over a time, a tribe with a long lease would lose relative to those with short term leases.[79]

Long term leasing problems can be avoided if terms could be renegotiated periodically. Some leases contain provisions enabling the Secretary of Interior to redetermine royalty rates and other provisions of a lease every 10 years. But such leases rarely contain a method by which a tribe can force such Secretarial action by not defining the reasons which require redetermination of lease terms.

DEMOGRAPH CHANGES CAN CAUSE SOME ADVERSE SOCIAL PROBLEMS

Mineral development invariably increases the population of non-Indians on or near a reservation, creating political difficulties for the tribal government and cultural problems for the Indians. Tribes wish to be able to reach a reasonable accommodation with the non-Indians who move in, but are unable to do so if they cannot set controls which are widely known from the very arrival of the new residents. An alternative in some cases is for Indians to provide the labor for developing the minerals. Although training may entail some costs, the tribe could exchange rental receipts for training opportunities if it could bargain effectively. If they could choose, some tribes might wish to impose environmental controls and workplace controls which lower the monetary return, while other tribes may prefer to maximize the monetary return. Unfortunately, tribes now receive low monetary return without any of the other controls either.[80]

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[78] Supra, note 6.
[79] Supra, note 7, Indian Natural Resources, p. 48.
[80] Ibid., p. 49.

Most of the problem areas identified earlier come about because of the weak beginning position of tribes in relation to the potential resource developers.

REASONS FOR INEQUITABLE LEASE ARRANGEMENTS

Trosper analyzed the reasons underlying these inequitable leases.[81] The reasons are numerous. First, neither the Indian people nor BIA officials possess adequate information on the size of deposits, the costs of exploration, costs of production, and market prices. The BIA has never carried out a complete topographic or geologic mapping of tribal lands. BIA does not have the expertise. The United States Geological Service (USGS) is supposed to advise the BIA; however, funds to do the work have never been appropriated to permit this to be done. Thus, it is impossible for tribes to put a value on their resources. Second, the BIA does not employ personnel with the skills necessary to undertake negotiations even if the data was available. For example, the BIA Navajo Area Office does not employ a geologist or mining engineer, nor is there a procedure for BIA personnel to exchange information with other BIA officials who are conducting similar negotiations. BIA in Washington opposes such exchange of information saying that "* * * tribes may believe that what has been obtained on one reservation could be obtained on their reservation without giving consideration to differing circumstances * * * also it would be difficult and expensive to establish a system." [82]

Third, bargaining power in lease negotiations is reduced because of inordinately long capricious delays in the approval process. For example, in January, 1973, the Navajo Nation sent out 25 invitations for uranium exploration. By January, 1974, they had determined that Exxon had made the best offer and entered into a flexible agreement. According to the agreement, after a deposit is found, the Navajos can choose whether they want to receive a negotiated royalty or a 49 percent working interest. The Navajo Nation requested Secretarial approval of the agreement. In turn, on April 2, 1974, the Commissioner of Indian affairs requested the Navajo area director to undertake an environmental impact statement which was finally initiated in January, 1976. Meanwhile, on March 10, 1975, an Assistant Secretary of the Interior determined that there was no reason for the Secretary not to approve the lease agreement.[83] But this determination had no immediate impact. For the lease was not approved until January, 1977. The 3-year delay cost the Navajos $1,642,500 in unpaid interest.[84]

Fourth, tribal bargaining power is weakened by State taxation of non-Indian mineral developers. State taxes on mineral production (severance and sales taxes) fall upon the owners rather than the developers of the resources. The developer passes along his taxes to the owners in the form of lower royalties. The developer does this by including State taxation when he calculates his expected profit. The larger the tax, the smaller the royalty. Most often, taxes exceed royalties. For example, on the Crow Reservation, the Montana State tax revenue received from a private mining operation amounted to $3,988,424 for the period of July 1975 to March 1976. During the same period, the tribe's royalties were $1,270,530. A State tax, upon mineral developers, is, in fact, a tax upon Indians. Indians do not both tax and receive royalties. Usually, they just receive royalties. The difference between the two is important from a company's point of view.[85]

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[81] Supra, note 6.

[82] Supra, note 7, p. 13.

[83] Memorandum from Jack W. Carlson, Asst. Sec. for Energy & Minerals: Subject: "Financial Analysis of the Proposed Navajo-Exxon Uranium Prospecting and Mining Proposal" Dept. of the Interior, Washington, D.C., Mar. 10, 1975.

[84] Lorraine T. Ruffing, Navajo Mineral Agreements, a paper delivered at annual meeting of Eastern Economic Association, Hartford, Conn., Apr. 14, 1977, p. 14.

Depending upon how Federal tax laws treat tribal taxation, it might be possible for a company to deduct a tax from its Federal tax rather than from its before-tax income.

To illustrate this, consider a $500,000 annual royalty charge. A company deducts it and pays taxes on the remaining profits—for example—at a 40 percent rate. Converting the royalty to a tax means that before tax income would rise by the $500,000; the company would pay 40 percent of this, or $200,000, in increased taxes. But the company now deducts the tribal tax of $500,000 from its now higher Federal tax. The result is that the company's total after tax income rises by $300,000. The company would prefer paying a tax rather than a royalty, and a tribe could bargain for a higher cash return from taxation than from rental.[86]

Fifth, Indian tribes and Indian individuals, as tribal members, continue to have difficulty obtaining credit. Access to credit would improve the threat by Indians to perform development themselves rather than in conjunction with outside developers. With the very large capital requirements of some mineral development methods, this constraint may not be relevant: even if tribes were as able as anyone to get credit, they could not finance a large coal development. Even the energy corporations enter consortiums and use Government guarantees to assemble the required financial backing. Access to credit would enable a tribe to hold out during a negotiation by decreasing its need for cash from a lease.[87] Access to capital could also improve access to information.

Finally, the tribe's bargaining position is weakened by the fact that mineral revenues constitute an important source of tribal income. For example, in 1975, 70 percent of Navajo tribal revenue was generated from mineral leases. Thus, the Navajo tribal government is not in a position to cancel leases, or even refuse to negotiate new leases if it wants to maintain its administrative and service functions. Thus, fiscal necessity dictates the rate of resource exploitation.

NEW FORMS OF AGREEMENTS

Until the early 1960's, most Third World Countries were in a similar position to Indian tribes. Unlike Indian tribes, however, they have been able to shift the balance of power and in doing so have secured a larger share of mineral income. Their increased leverage derives from their newly asserted sovereignty; from the growing political awareness of their citizens; from the entrance of new transnational corporations; and lastly, from the threat that they will develop their resources themselves.[88] Third World Countries were able to switch from fixed royalties to royalties based on a percentage of value of the exploited resource, supplemented by income taxes on the company profits. They have also been experimenting with new forms of agreements such as joint ventures, production-sharing, and service contracts. Under a joint venture, the country shares expenses and profits rather than receiving a royalty. Under production-sharing or service contract, the foreign firms obtain no ownership interest, and the resource owner is able to retain control. In production-sharing agreements, the country and the firm share output in predetermined proportions. Under a service contract, the country merely purchases services from the firm reimbursing it for actual costs. Additional payment to the firm based on profits, in some cases, is given to encourage efficiency.

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[85] Supra, note 1, p. 47.
[86] Ibid., p. 48.
[87] Supra, note 6.

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Indian tribes have not been able to enter joint ventures because of the capital required. However, there are indications that energy companies are willing to go into joint ventures with tribes for development of their mineral resources. Participation agreements may be very attractive to tribes, but a tribe going into 50–50 partnership should take precautions to insure that their participation is not superficial in nature, and they assure that they have an effective role in management decisions within the operating company. The experience of developing nations in joint ventures where the mineral companies pay all exploration and development cost has been that the companies usually demand that the government not tax production. Some of these countries were surprised to learn that they had shorted themselves of potential earnings by giving up their tax right. This is usually true where the ratio of loan capital to equity is relatively low and most of the money goes to repayment of debts. One very important factor is access to information about the operation of production and the technical know-how to interpret all of the technical data that came with such responsibilities. There are two problems which are central to joint management control. One is making sure that the tribal managers get all the necessary data to make the best decisions and the other is in trying to decide which issues they should direct their efforts to.

One tribe, the Blackfeet, has entered into a service contract where the contractor has no ownership or equitable interest in the lands or minerals produced nor a leasehold interest in the mineral estate. All production is owned by the tribe. The contractor owns the equipment, and advances funds for exploration and production—receiving repayment from the production. The tribe receives a one-sixth royalty; and 50 percent net profits after the contractor has recouped his costs. The contractor receives the other 50 percent.

At the same time, while joint ventures, production-sharing and service contracts would allow more Indian control over resource development, they might not always increase resource returns. The potential benefits from these agreements are subject to more risk than are the returns from a royalty agreement. For example, under a joint venture, the tribe risks losing its equity capital if no discovery is made or if substitutes are developed. And while production-sharing or service contracts are not subject to this, these agreements yield higher revenues only if carefully monitored. The Blackfeet Tribe will have to verify the actual amount produced, the actual costs incurred, and the selling price. Thus, these new agreements require the use of scarce tribal capital and technical skill and knowledge.

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[88] C. Diaz-Alyandro "International Markets for Exhaustible Resources, Less Developed Countries, and Transnational Corporations" Center Discussion Paper No. 256 Economic Growth Center, Yale University, December 1976.

It should be emphasized that service contracts have one important advantage over royalty agreements and joint venture and that is the non-Indian firm acquires no taxable interest in Indian land or minerals.[89]

TRIBAL GOALS AND MINERAL DEVELOPMENT

Mineral development can provide improved opportunities for progress toward self-sufficiency where agreements allow fuller participation through increased jobs and income, expansion of local markets, and improvements of the infrastructure. But, at the same time, tribes must be allowed to control the unwanted side effects. Environmental degradation and the rapid influx of non-Indians to the Indian community can negatively affect undesirable outcomes. Tribal governments must be free to balance benefits and costs and choose the rate of mineral development which will support their aspirations.

Tribes have been unable to develop their own resources as a result of:

1. lack of control over the resources;
2. lack of technological expertise and skilled labor; and
3. lack of capital.

The BIA has seldom attempted to assist the tribes in tribal development of their mineral and petrochemical resources. Rather, its involvement in resource exploitation has consisted largely of arranging leases of Indian land including the mineral contents to major petrochemical and mining companies at questionable rates.

Indian people are losing valuable non-renewable resources to corporate developers. The return to Indian individuals and tribes is minimal. The most valuable development asset of many tribes is being wasted for them.

Tribal goals of self-sufficiency, income, jobs, and environmental protection are the fundamental priorities which should be addressed in any decisions about use of resources.

RECOMMENDATIONS

The Commission recommends that:

(1) Congress provide the United States Geological Survey and the Bureau of Mines with the funds necessary to compile mineral inventories of all tribal lands. These inventories should be field geological surveys using Indian people as trainees. The results should be confidential to the tribes.

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[89] A. Zlontz, Indian Self-Determination: New Patterns for Mineral Development. Institute on Indian Land Development—Oil, Gas, Coal and Other Minerals organized by Rocky Mountain Mineral Law Foundation, Tucson, Ariz., Apr. 1–2, 1977, paper 13.

(2) Congress provide the Division of Tribal Resource Development, Bureau of Indian Affairs, with funds to train a minerals negotiating team composed of known international and national experts approved by the affected tribes. These experts would be at the disposal of Indian tribes to aid and advise during negotiations.

(3) The Bureau of Indian Affairs discontinue outdated royalty agreements, lengthy lease periods, no readjustment clauses, vague employment and environmnetal clauses, and waivers from tribal taxation. Title 25, sections 171 and 177 of the Code of Federal Regulations, should make clear that alternatives exist to the outdated lease agreement presently in use.

(4) Congress provide funds to the Department of Interior to effectively monitor Indian mineral agreements and insure that production is accurately reported, royalties and other fees promptly paid, employment and environmental provisions honored. Monetary penalties be imposed for noncompliance.

(5) Congress provide funds to set up a low-interest loan fund to aid those tribes who wish to engage in joint ventures.

(6) Congress provide legislation to prohibit any State taxation of non-Indian mineral developers in their transactions with Indians within the tribal lands.

(7) If the tribes decide to enter joint ventures, agreements with developers, ownership and control of minerals and processing be kept in Indian hands. Contracts for work on technology purchases would be examples of such agreements. Funds be made available for tribes to employ legal counsel and geological experts to aid them in their mineral contract decisions whenever possible.

(8) The U.S. Government make available technical assistance and teaching personnel in geological fields so that Indians can learn to be surveyors for their own tribes.

(9) The present laws be amended to insure tribal control of the development of Indian-owned natural resources including water, coal, oil, uranium, gravel and clay, and all other minerals. The laws, once amended, should be flexible enough to allow the tribes to determine for themselves the best form of organization which will enable them to control development and realize the maximum financial returns from the development of their natural resources.

(10) Title 25, sections 171 and 177 of the Code of Federal Regulations, should make clear that alternatives exist to the outdated lease agreement (contracts), most immediately with regard to the development of coal. Reclamation regulations also be clarified.

(11) Congress amend the Freedom of Information Act to exempt tribal proprietary rights from its application.

HUMAN RESOURCES

Discussions of human resources on Indian reservations invariably center around such issues as idleness, unemployment, and welfare. Depending on whose figures are accepted, 30–70% of Indian adults are described as unemployed. And implicit in these descriptions is both a moral judgment and a fatalistic acceptance.

But of course, the human resource question can be approached from the opposite standpoint. The large number of people unemployed can be viewed as a positive factor. They can be described as a large labor pool. They can be viewed as a potential resource for development, just as minerals and timber are potential resources for development.

Already alluded to is the fact that the size of this Indian labor pool is unknown. BIA statistics with respect to the number of unemployed on Indian reservations are based on, at best, arbitrary criteria; at worst, impressionistic judgments by local agency personnel. Examination of BIA unemployment data for 1967–1975 did not reveal any consistent pattern. Of the 28 reservations with comparative data, unemployment rates for 17 were actually lower in 1967 than in 1975. In the remaining 11 cases, unemployed had declined in 1975. The pattern of increase and decrease is so erratic that no attempt was made to correlate them with successive increases in investment. A further deterrent to correlation was due to unreliability of the data base. The BIA Labor Force statistics are compiled on an annual basis by the agency or area office. The agency does not take a household survey to establish these figures but merely adjusts the previous year's figures to reflect any changes it thinks may have occurred. The Bureau's justification for lack of accurate statistics is twofold. (1) It claims lack of personnel. (2) Its response through its representative is sufficient, "What good are accurate statistics?"

It is disheartening that there is no determination on the part of BIA officials to accurately document the situation. If accurate unemployment figures are not collected from year to year, how can one judge the effect of Government programs, particularly manpower programs? Good statistics are not ends in themselves but invaluable to evaluation of Federal programs and policy. Indian income and employment statistics are used by the Department of Labor to determine Indian fund allocation under the Comprehensive Training and Employment Assistance Act. The officials administering this program know the U.S. Census Bureau figures and BIA figures are unreliable. Nevertheless, they are unable to collect their own data and so rely on Census and BIA. There is no excuse for basing Federal program planning and funding on an unreliable data base.

An attempt was made to compare the Indian rates of unemployment with U.S. Census Bureau rates for the Nation. While this comparison is often made by respected scholars, it is fallacious comparison. The BIA uses a different definition of employment from the U.S. Census Bureau.

The Census Bureau defines an unemployed person as one who has been seeking work within the 4 week period previous to the interview. The BIA definition includes those seeking work as well as those not seeking work but who are employable. This gives the BIA a larger labor force figure and inflated rates of unemployment. For example, the BIA Labor Force Report, April 1975, reported the labor force of Standing Rock as 1,229 of which 737 were employed, and 492 were not employed. Of the 492 unemployed, 320 were seeking work. The BIA rate of unemployment was (429/1,229) 40%. If we use the U.S. Census Bureau definition and subtract out those not seeking work (172) from the labor force and from those unemployed, we obtain a lower rate of unemployment (320/1,055)30%.

The BIA is aware that it defines unemployment differently but it justifies the difference by saying that the nature of job search is different on the reservation and so the U.S. Census Bureau definition has little relevance. On the reservation there is almost perfect job information. Everyone knows when there is a job opening and therefore does not have to search continuously. Therefore, if a census taker asked an Indian, "Have you looked for a job in the past 4 weeks?" he might reply, "No," because there had been no job openings and being rational he wouldn't seek what didn't exist. If BIA is correct, then the U.S. Census figures for American Indians are underestimates, while BIA figures are overestimates. The truth is somewhere in between. Possibly for the 1980 U.S. Census Bureau, the question should be modified for American Indians. They should be asked, "When job opportunities occur, do you seek them?" In this way the U.S. Census Bureau might be able to more accurately determine who is to be included among the unemployed. As for the BIA, its data base will remain inaccurate and useless for any comparative purpose of determination in the allocation of Federal grant money and for program evaluation until it is actually based on household surveys, and uses the same definition as the U.S. Census Bureau.[90]

There is an urgent need to develop a uniform, consistent, and accurate data base now, so that the effects of Government programs and all expenditures on development can be measured.

Be that as it may, even though the numbers are not known, there is clearly a large pool of unemployed people on the reservation. Thus, we have the second of the three classic ingredients—natural resources, capital, and human resources—economic development.

But this large labor pool is still only potentially useful from the standpoint of reservation economic development. Part of it is untrained. Part has been provided with training not applicable to reservation development. Finally, certain types of professional training have never been emphasized.

The great majority of training programs directed at Indian people have involved teaching blue-collar occupations. Even where professional training has been delivered, the focus has been on training teachers, the social sciences and to a lesser extent, law and health. Few people have been trained, or have sought training, in the hard sciences, such as engineering, business, and administration.

Why? With respect to the blue-collar occupations, the inadequacies of secondary education on the reservation is a potent force pushing the young Indian person toward trade schools; furthermore, this structural force is generally supported by the school counselors. With respect to higher education, the situation is somewhat more complex. Two forces seem to be responsible for the fact that the great majority of Indian students who go on for higher education opt for such disciplines as teaching and social sciences. One reason for this is that the only Indian role models young Indian students have encountered are usually in either teaching or social services. Another is that school counselors seem to be not aware that professionally trained Indian administrators or technical experts are needed on the reservations.

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[90] Task Force No. 7, final report, AIPRC, July 1976, p. 84.

So what needs to be done? Education and training must be intermeshed with reservation development. Skilled workers are required in many areas. Technical experts—e.g., engineers—are required. And finally, people with training in administration and management are required.

The specific types of requirements vary from one reservation to another. But the principle remains constant. Indian education and training must support reservation development. People must be produced with relevant skills. Education and training programs for the sake of education must be replaced by education and training directed toward Indian self-sufficiency through resource development. Teachers, social service personnel are needed—and training should continue in these areas. But on every reservation, there are potential engineers, scientists, and administrators. And these potential engineers and scientists and administrators must be found and encouraged. To do this a far better program of career counseling must be available on the reservation at the high school level and beyond. And of course, to be a better program, this career counseling must take account of the unique developmental opportunities in the Indian communities.

What can this lead to? It can lead to realizing the view described in our first paragraph. It can lead to recognizing that the large pool of unemployed Indian people on reservations is a positive asset, an asset which, when combined with Indian control of their natural resources and capital, can lead to the development of self-sufficient economies on Indian reservations.

Significant changes resulting from gradual implementation of the Indian Self-Determination Act (Public Law 93-638) will have a major impact on planning for Indian youth. Education programs for the sake of education must be replaced by education directed toward Indian self-sufficiency through resource development.

Indian education at the college level and beyond must support reservation resource development, and produce the needed, not the needy. Development of the diverse and extensive natural resources has been carried out by non-Indians with Indians generally participating at lower levels.

The development of these assets offers the opportunity to stabilize reservation economies and provide appropriately educated Indians a way to grow into higher levels of management and responsibility.

The following is a brief analysis of manpower programs administered by the Federal Government.

MANPOWER TRAINING: THE BUREAU OF INDIAN AFFAIRS

More Federal money goes to education, vocational skills, training, employment assistance and subsidization than for any other program area. Such funds are requested in order to alleviate the high rate of Indian unemployment which the BIA estimates to be over 39 percent.[91] Little or no consideration is given to the need to impart meaningful skills to the Indian labor force so that they may remain on the reservation and participate in natural resource development.

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[91] BIA statistics are suspect because of unorthodox methods of data collection, notably the use of "windshield estimates." The BIA does not use the standard labor force definition of "unemployed" and so their unemployment figures should not be compared with national figures. There is an urgent need to develop a uniform, consistent, and accurate data base so that Federal manpower funds can be properly allocated and the effects of such findings evaluated.

The first BIA manpower program, direct relocation, 1950 (now called direct employment) moved large numbers of skilled or employable Indians from reservations to urban centers where they joined the urban unemployed.

Recognizing that many Indians prefer to remain on the reservation, the BIA began, in 1956, to contract with private industry to provide subsidized on-the-job training (OJT) on the reservation. Because most Indian people are employed as unskilled workers, the BIA also instituted, in 1956, a number of vocational training courses (AVT) located both in urban centers and near reservations.[92] The Department of Interior recently did an audit of the direct employment program and the adult vocational training and discovered that neither was being run according to the regulations.[93] Performance figures for both programs were inaccurate and misleading since both programs were being utilized in ways quite different from intended. For example, OJT money was going to students enrolled in college studies which were not vocationally oriented. The following table contains outlays for these programs.

TABLE 1.—FUNDING FOR BUREAU OF INDIAN AFFAIRS EMPLOYMENT ASSISTANCE, FISCAL YEARS 1966- 7

[In millions of dollars]

	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975
Adult vocational training	11,421	13,259	13,830	15,700	25,000	24,273	24,716	22,408.5	19,035.4	19,684
Direct employment (relocation and O/N placements)	3,007	3,864	7,267	8,477	12,761	14,935	15,133	15,700.5	13,336.8	14,107
On the job training (under AVT until 1974)[1]								(3,400.0)	(2,600.0)	(2,400)
Indian action							(7)	5,283.1	8,916.2	10,460
Total	14,428	17,123	21,097	24,177	37,761	39,208	39,849	43,392.1	41,288.4	44,251

[1] Non-add to total.

Source: Data provided by the Division of Job Placement and Training, BIA, 1976.

INDIAN ACTION TEAM

Indian Action Teams were begun under the Division of Job Placement and Training in the BIA in 1972. The program is a broadly oriented effort.

> Indian action team program is a reservation-base program benefiting Indian people with skills training; strengthening of tribal government; projects completed as a result of the on-the-job training; development of management capability leading to increased capability to contract for Bureau of Indian Affairs services in accordance with the Indian self-determination concept; attracting additional funds from other agencies; development of tribal enterprises, whether they be commercial or limited to revenue-producing activities on reservations. This type of program directly benefits individuals and the tribe in general.[94]

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[92] Sorkin, A., American Indians and Federal Aid, Washington, D.C., Brookings Institution, 1971, pp. 107–109.

[93] Review of Adult Vocational Training and Direct Employment Assistance Programs, Bureau of Indian Affairs, Office of Audit and Investigation, U.S. Dept. of Interior, May 1976.

[94] Commissioner Morris Thompson, BIA, Senate Interior Appropriations hearings fiscal year 1976, pt. 3, p. 902.

Indian Action Teams are organized on reservations by residents and operate under contracts from the Indian Technical Assistance Center in Colorado. They are supposed to provide training in a skill while carrying out activities useful to the reservation. The program has concentrated on construction skills, but has begun to train in other skill and vocational areas. With a budget of $800,000 in fiscal year 1972, the program consisted of three action teams. In 1976, it had a budget of $23.5 million and consisted of 86 action teams under contract.[95] For fiscal year 1977, the BIA requested $14 million for the program, a reduction of $1 million from the fiscal year 1976 funding.

The Indian Technical Assistance Center has argued strongly for a $28 million budget for 1977. This level of funding is based on the total of 200 tribes ITAC claims wish to contract for action teams and the strong support the program has received. This has been eloquently shown by the support the programs have received in appropriations hearings from national Indian organizations and many tribal governments.[96]

The Indian action program possesses the unique feature of mobilizing local support to provide community services and facilities. Thus, it can have a long-run impact on the reservation.

Despite the last 25 years of effort, the greatest barrier to increased employment on reservations is quite simply lack of jobs. In the period from 1966 to 1973 the BIA reported a figure for participants in Direct Employment and AVT that equaled 60 percent of those enrolled in the Indian labor force. If other training programs are considered, such as Indian Action Teams and CETA, it is not unreasonable to assume that every member of the Indian labor force has participated in a training program at some time. The continued high rate of unemployment of that labor force could be attributed to lack of appropriate training and lack of jobs. It is probably both.

MANPOWER TRAINING: DEPARTMENT OF LABOR[97]

The Department of Labor's (DOL) Indian manpower programs were authorized by the Comprehensive Employment and Training Act of 1973 (CETA). DOL's program like the Indian Action Team, is only partially oriented toward training while promoting local management, and transitional and temporary employment. Training under CETA has, according to many prime sponsors been hampered by the lack of technical assistance provided by DOL and by limitations on the consulting services which may be contracted for by prime sponsors. Part of the overall concept of CETA is the decentralization of training and employment activities. This assumes that there will be experienced local personnel to run these programs. This is not yet true for many reservations. Table 2 presents DOL funds expended under CETA.

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[95] Funding came from two sources, $14.8 million from appropriations to BIA and $8.5 million from title X funds under the Public Works and Economic Development Act of 1965, as amended by the Emergency Jobs and Unemployment Act of 1974.

[96] Letters and documents received by Task Force No. 7.

[97] CETA information submitted to the Commission, 1976 CETA budget justification.

TABLE 2.—FUNDING UNDER CETA TO INDIAN ORGANIZATIONS OR FOR THE BENEFIT OF INDIANS

	Title I	Title II	Title III		Title VI	Total
			Sec. 302	Sec. 304		
Fiscal year 1975	(¹)	²$7,063,094	$49,279,000	³$7,400,000	$5,987,590	$6,972,9684
Fiscal year 1976 (estimate)	(¹)	1,800,235	⁴51,841,000	³8,884,940	8,139,597	70,665,772
Transition quarter		450,055	12,640,000	⁴NA	⁵6,018,915	19,103,970
Fiscal year 1977 (estimate)		2,000,000	50,560,000	NA	(⁶)	52,560,000
Total	(7)	11,313,384	164,320,000	16,284,940	20,146,102	212,064,426

[1] Estimated Indian participation in title I programs not calculated.
[2] This figure includes "carryover" funds from fiscal year 1974.
[3] These figures are for the summers at the end of the respective fiscal years.
[4] Includes $17,000 of unobligated 1975 carryover and $1,264,000 compensating adjustment for a like sum utilized in financing Job Corps contracts in fiscal year 1975.
[5] This represents part of a supplemental appropriation under title II to support title VI programs through December 1976 and their phaseout by the end of fiscal year 1977.
[6] Program phased out.

Sources: CETA Information submitted to the Commission, 1976 CETA budget justification, various numbers of the Federal Register.

American Indians have not been eligible for CETA funds under title I because DOL refuses to recognize tribal governments as "local" governments. This is a prime example of failing to understand the unique status of American Indians. Labor officials dismiss this problem by pointing out that Indian people may participate under title III. In fact, in 1975, there were 133 prime sponsors for title III Indian programs receiving an average of $98,558 per program participation, including administrative costs. This average expenditure is not accurate since 20,800 participants left the programs during the year, with 6,100 of these reported to have entered employment. Table 3 shows the activity of CETA participants. What is important is the stress shown by these figures is on employment and subsidization rather than formal training.

TABLE 3.—EXPERIENCE OF CETA PARTICIPANTS

Activity	Participants	Percent
Classroom training	7,300	14.6
On job training	3,600	7.2
Public service employment	2,500	5.0
Work experience	25,000	50.0
Other	12,200	24.4
Total	50,600	

This brief and rapid summary of manpower training has made it apparent that it is difficult to gauge the effects of these programs because of the lack of reliable data on the participants and on the Indian labor force in general. It appears that the general thrust of these programs is employment, particularly temporary employment, and little formal training is taking place. However, it is unfair to criticize these programs if Indian communities do not have an inventory of what skills are most needed. In addition, it is futile to train workers when there is no possibility of obtaining employment. To achieve maximum effectiveness, manpower training programs must be linked with specific programs to develop Indian resources.

The recommendations that follow include those made by the General Accounting Office in two previous reports to Congress.[98]

RECOMMENDATIONS

The Commission recommends that:

The United States Bureau of Labor Statistics collect accurate, uniform, and consistent statistics on an annual basis on the Indian labor force on every Federal and State reservation. The Bureau also collect statistics on jobs available on each reservation, by type of economic activity, and should indicate if the job is held by an Indian or non-Indian.

The executive branch require the Bureau of Indian Affairs and the Department of Labor to keep accurate and detailed statistics on every participant in federally funded manpower programs. Participant's subsequent job status should be monitored for at least 5 years.

The executive branch require that the Bureau of Indian Affairs and the Department of Labor coordinate their manpower programs with Tribal Development Programs and Economic Development Administration. EDA specify for the BIA and DOL the manpower requirements for their projects including the setting up as well as the operation. BIA and DOL institute the necessary training programs in advance of the EDA projects.

Education of Indians be relevant to the needs of the communities and that emphasis be placed on education and training in hard sciences, business, and administrative management disciplines.

The Office of Management and Budget take the necessary action to insure that:

An approach is developed which will coordinate Federal efforts at the reservation level;

Continuous evaluations are conducted of the effect that Federal programs have on the standard of living at Indian reservations including developing information systems to support such evaluations; and

Annual reports are submitted to the Congress on progress made in improving the standard of living of reservation Indians and on any needed changes in legislation to improve the effectiveness of Federal programs.

If early action is not taken, we recommend that the Congress enact appropriate legislation.

PHYSICAL INFRASTRUCTURE

Another factor long recognized as necessary for economic development are investments in physical infrastructure. Physical infrastructure consists of transport, power, water, and communications systems. Investment in infrastructure is generally not attractive to private investors because it requires large expenditures for which there is no way to insure a return. Infrastructure investments are usually provided by governments from their tax revenues. Most governments subscribe to the philosophy of balanced growth of public services and private productive capacity. Infrastructure, provided in a timely manner, increases the productivity of private economic activity.

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[98] U.S. Comptroller General Report to the Congress, Improving Federally Assisted Business Development on Indian Reservations, GAO, June 27, 1975; Better Overall Planning Needed to Improve the Standard of Living of White Mountain Apaches of Arizona, Aug. 12, 1975.

Indian reservations are characterized by an "underdevelopment" of both infrastructure and economic activity. There are fewer roads per square mile, and fewer houses with plumbing, electricity, and phones on reservation land compared to the immediate adjacent areas. As a result, most economic activity involving reservation residents takes place in "border" towns which have improved facilities. Revenue generated within the reservation is either earned by non-Indians in the first instance, or if earned by Indian people, it immediately leaks out to the surrounding nonreservation communities.

Since tribal governments have neither received a fair share of revenues from their physical resources nor exercised their fiscal powers, they have been unable to provide the infrastructure necessary for their development. Provision of the necessary elements of infrastructure would be of immeasurable help in development of tribal self-sufficiency.

A full discussion of infrastructure needs for development would include systems not dealt with here. The most significant of those excluded are sanitation-related water systems and waste disposal. These needs are discussed in detail in chapter eight.

Without detailing the economic costs, it is clear that new and existing reservation enterprises face tremendous problems without adequate transportation, power, and water systems. At the same time, however, providing all systems necessary for planned reservation development would be prohibitively expensive in most cases.

Even if all the Federal funds could be made immediately available for expansion or provision of required infrastructure, few reservations could afford the maintenance costs. Furthermore, the Government has generally provided inadequate funding for maintenance for less than required infrastructure. The Federal Government should provide adequate funding for maintenance of infrastructure, in the interim to financial stability.

Significant increases in the provision of capital for infrastructure are required. Tribal governments must, however, rely heavily on sound and comprehensive planning in expending available capital. In addition to directing funds, maintaining and upgrading crucial elements of existing systems, new construction should be approved by the tribe in accordance with tribal plans. Each tribe should carefully weigh more quantifiable economic justifications for infrastructure against socially and culturally justified needs.

With the exception of a few reservations which have taken steps to manage their own communications systems,[99] most reservations are generally served at low levels by telephone and other communications systems from surrounding non-Indian areas. Federal funding in these areas is primarily from categorical grant and loan programs aimed at rural areas generally.

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[99] The Rural Electrification Administration, Department of Agriculture made a loan of $3,200,000 to the Cheyenne River Sioux in 1976 to improve and expand their telephone system. See DOA News Release, Mar. 19, 1976.

With the exception of those reservations which have combined power and irrigation works and those remote enough to require their own generating facilities, the power needs of most reservations are served with varying adequacy by systems from nearby areas. In recent years some reservations have begun to develop or take over either their own distribution systems or entire power systems based on hydroelectric plants on or near the reservation.[100]

The most important component of reservation transportation systems is roads. Rail connections are minimal and exist only as unintended spinoffs of non-Indian railway system needs. Air transportation is economically most important in Alaska, where most of the funds available from the Federal Aviation Administration have gone.[101] Local and limited air facilities in other communities are of potential economic importance primarily for tourism. Some use has been made of air transport for carrying low weight industrial materials and products, but this remains minimal.

Existing airport facilities on reservations, used for personnel movement and emergency transport have been maintained to some extent by the BIA's Division of Transportation (paving of runways) and with some funding from the FAA.

Roads

Road systems have been and remain the major mode of transportation within reservations, and between reservations and surrounding areas. The development of road construction on reservations has created a situation where primary, long distance roads are generally more adequate than local and connecting roads. This has resulted from building and maintaining routes required for long distance non-Indian transportation needs.

The Federal Government began providing funds for building roads on reservations in 1935 through the BIA road program.[102] In addition to reservation roads under the BIA's jurisdiction there are currently roads under the jurisdiction of counties, States, and the Federal aid highway system on reservations. The Bureau's road construction program is carried out by Bureau and Federal Highway Administration personnel. They operate under a memorandum of agreement between the BIA and the FHWA. The Bureau indicates that tribes, through their governments or road committees ay determine road priorities and needs. Roads constructed by States and counties receive funds from the Highway Trust Fund if they are on the designated Federal aid system. Of the over 21,000 miles of State and county roads, approximately 11,000 miles are reported to be on the Federal aid system. Funds for these roads are allocated by formula to States and tribes must request and compete for funding for qualifying roads for their reservations. It is felt that tribes receive less than a proportionate share of trust fund moneys through the States. This has generated a series of proposals within the BIA to create an Indian Highway

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[100] Both EDA, Commerce, and REA provide infrastructure loans. BIA's Credit and Finance Office has reported assisting several utility systems in Alaska under enterprise loans and grants.

[101] News releases and other communications submitted to the Commission by the Rural Electrification Administration, DOA.

[102] Information provided to the Commission by the Federal Highway Administration.

System, encompassing all roads on Indian lands in the BIA-Federal aid system, which would qualify for Highway Trust Funds more directly.[103]

The inequitable share of Highway Trust Funds received by reservations through States has been recognized. Recent legislation stresses the need for BIA road funding to be in addition to, not in lieu of, other Federal aid funding.

POWER, WATER, AND COMMUNICATIONS

With the exception of those reservations which have combined power and irrigation works and those remote enough to require their own generating facilities, the power needs of most reservations are served with varying adequacy by systems from nearby areas.

Similarly, most reservations are generally served at very low levels by the telephone and other communications systems from surrounding non-Indian areas. There has been no comprehensive survey of the adequacy of these local systems. Therefore, it is difficult to say what level of Federal spending would bring these systems up to par.

The Economic Development Administration has found it necessary to spend at least 84 percent of all its funds on public works projects such as water and sewer systems and industrial parks. This lack of infrastructure has caused their funds to be diverted from the actual financing of tribal enterprises.

IMPACT OF INADEQUATE INFRASTRUCTURE

Adequate public services stimulate the reservation's economy. Lack of these services deters investment in private sector activities such as retail activity. Reservations are marked by an absence of commercial establishments such as supermarkets, gas stations, restaurants, and motels. As a result, Indian and non-Indian reservation residents, as well as tourists, must patronize border town commercial establishments, and reservations receive little or no income from commercial enterprises.

Road Maintenance

Maintenance on roads under BIA's jurisdiction has been estimated by its Division of Transportation to be about 40 percent adequate.[104] In the hearings for 1976 appropriations it was estimated that the BIA's road system was deteriorating at the rate of about $40 million a year. For the same period BIA was obligating about $9 million a year for maintenance.[105] A considerable portion of the road construction budget is admitted to go for the reconstruction and upgrading of prematurely deteriorated roads.

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[103] Fiscal year 1977 Interior appropriations hearings, House of Representatives, pt. 6, p. 208. The 1977 Federal budget was reported to have recommended that BIA, BLM, and National Park Service Roads not be included in the Highway Act. It was evidently intended that they submit independent requests for direct appropriations. This evidently did not happen.

[104] "A Proposal for Financing the Construction of Federal Aid Highways on Indian Reservations", p. 4, Division of Transportation, Office of Engineering, BIA, Feb. 9, 1973, mimeo.

[105] Fiscal year 1976 Interior appropriations hearing, House of Representatives, pt. 3, p. 88.

Needs and Adequacy of Roads

Assessments of overall road needs on reservations until recently have been based on several types of comparisons. Comparisons made of road mileage per area and population for reservations and non-Indian areas were made. Comparisons made of reservations with surrounding nonreservation counties have been the most reasonable. They have consistently shown Indian road networks to be about one-half the density of non-Indian networks.

The existing provision of road construction and maintenance by the BIA combined with the roads provided by surrounding States and counties is clearly inadequate. The BIA's estimates suggest that one-half of the $80 million requested for construction and maintenance in 1977 is required to simply maintain the status quo. The remaining $40 million for upgrading and expanding the system is clearly inadequate compared to the FHWA Study. It is obvious that the existing system cannot be improved let alone expanded under the current budget levels.

Inadequate transportation systems are a hindrance to development. Reservation transportation networks should be related to tribal development plans as well as to social and educational needs. In the long run, however, the level, type, and distribution of economic activities will significantly determine the extent to which roads remain usable and safe. There is clearly a need, legal basis, and strong precedent for greater Federal support in road construction and maintenance.

RECOMMENDATIONS

The Commission recommends that:

The executive branch direct the development of a physical infrastructure program through the joint efforts of the tribes, the Department of the Interior, the Federal Aid to Highways System, the Commerce Department, and the Department of Transportation. Such a program be part of a special economic stimulus effort for tribes. It could also include significant increases in the amount of capital to be made available through grants and loans.

Congress appropriate sufficient funds to upgrade the existing transportation mechanisms in the Indian communities and provide for a maintenance program that would not allow a deterioration of existing facilities.

INVESTMENT CAPITAL

Capital is needed for a wide range of investment purposes in Indian country. Some of those needs are land consolidation, agricultural development, and the reaction of viable ventures in agriculture, industry, business, fisheries, and timber. Since investment capital has been very scarce in Indian country, a clear picture has not been established as to what total capital requirements exist. It is known that they are significantly greater than the present availability of capital from present sources. Clearly an analysis of capital requirements in Indian country is critically needed at this time and would be the first step in any policy to provide tribes with greater access to investment funds.

Capital can be generated from three sources: internally from tribal sources or externally from traditional capital markets or from specially created sources of capital such as a developmental bank for American Indians. The first two sources now are available to tribes but have not met the unique capital demands existing in Indian country. The third source, if it were developed, might provide a solution. It is certain that tribally generated capital will, for the foreseeable future, be insufficient to meet investment requirements. Existing Federal programs providing access to capital have also proven insufficient to meet tribal investment needs as well as being too restrictive with respect to the utilization of such capital.

Indian people have tribal funds, Federal loans, grants and private loans as capital sources. There are no data available on the exact amount of private commercial capital loaned to Indians. It is generally assumed that the amount loaned is small because Indian borrowers do not have acceptable collateral.

Tribal income originates from the sale or lease of trust resources, claims awards, judgment funds, interest from investments, interest from Treasury deposits, and profits from enterprises. All revenues except enterprise profits are considered tribal trust funds and are deposited initially in the U.S. Treasury where they earn 4–5 percent simple interest. Individual Indian trust income earns no interest at the Treasury. Because little or no interest is earned on Treasury deposits, most tribal funds are now invested by the BIA Branch of Investments. On June 30, 1975 the Branch of Investments reported that tribal and individual trust moneys invested in Government securities and in time certificates of deposit totaled $542.3 million. Thus, the non-Indian banking sector benefits from scarce Indian capital. During fiscal year 1975 Indian trust funds invested by the Branch earned 9 percent with no risk. Investment procedures of BIA and problems with the governing law are discussed in the following section on investment of tribal trust funds.

Out of 32 reservations studied,[106] it was discovered that two tribes had been prevented by the area director from investing their funds with a bank of their choice. Two other tribes had taken their money out of trust and were investing it themselves. Most of the remaining tribal chairmen said they lacked investment expertise and that their people wanted their money safe so they decided to leave their funds on deposit with the Branch of Investments.

FEDERAL LOANS

The largest source of Federal loan capital is the Revolving Loan Fund (RLF) of the Bureau of Indian Affairs. It was created by the IRA in 1934 and by 1973 it contained $28.8 million.[107] It was long recognized that this loan fund was inadequate for Indian needs and it was augmented by the Indian Finance Act of 1974.

The Division of Credit and Finance, of the BIA keeps records on the RLF and on loans made with tribal funds. See table.

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[106] Task Force No. 7, final report, AIPRC, Washington, D.C., July 1976, p. 79.

[107] Information received by the Commission from the Division of Finance and Credit—BIA.

OUTSTANDING BALANCES REVOLVING LOAN FUND

Origin of funds	Fiscal years		
	1973	1974	1975
Bureau of Indian Affairs	$27.8	$28.5	$36.4
Funds of Indian organizations	144.9	172.0	169.7

Source: U.S. Department of Interior, Bureau of Indian Affairs, Division of Credit and Finance, Annual Credit and Finance Report fiscal year 1973 and 1974. Figures for 1975 from the Division of Credit and Finance.

The increase in the RLF between 1974 and 1975 was due to the Indian Finance Act. Prior to the Act, the interest rates on the Revolving Loan Funds were around 5 percent. Tribes generally make low returns on their loan programs although they did provide inexpensive funds to tribal members. This is another reason for placing the bulk of tribal trust funds with the Investment Branch. The Act has raised the floor on interest payments in the Revolving Loan Fund to 7 percent.

IMPACT OF INDIAN FINANCE ACT

The Act authorized the addition of $50 million to the Revolving Loan Funds, insured and/or guaranteed a total of $200 million in loans and provided an additional $20 million a year for 3 years to cover administrative expenses, interest subsidies in reguaranteed loans and the cost of guarantees and insurance beyond those covered by premiums and finally, it authorized $10 million per fiscal year for 3 years for Indian Business Grants.[108]

REVOLVING LOAN FUND

[In millions of dollars]

	Fiscal year 1975	Fiscal year 1976	Fiscal year 1977	Total
Authorized by Congress				$50
Requested by BIA	$38	$12		50
Appropriated by Congress	38	3		41

Source: U.S. Congress, hearing before a subcommittee of the Committee on Appropriations, House of Representatives 94th Cong., 2d sess., p. 111.

During the first year $38 million was appropriated for the Revolving Loan Fund. However, in October 1974, the fund had an unloaded balance of $41 million. Loans were not made because the BIA had not written the regulations nor hired the people to do the job. As a result $3 million was authorized in fiscal year 1976 and nothing in fiscal year 1977.

The Loan Guarantee and Insurance Fund began operation in August 1975, 16 months after it was authorized. In fiscal year 1975 no loans were guaranteed or insured, which left $20 million unused.

Consequently, only $10 million was appropriated for fiscal year 1976. The Bureau requested and received $20 million for fiscal year 1977 which frustrated the intent of Congress by $10 million and the Indians more lost opportunities.

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[108] Supra, note 1, p. 92.

LOAN GUARANTEE AND INSURANCE FUND

[In millions of dollars]

	Fiscal year 1975	Fiscal year 1976	Fiscal year 1977	Total
Authorized by Congress	$20	$20	$20	$60
Requested by BIA	20	20	20	60
Appropriated by Congress	20	10	20	50

Source: U.S. Congress, hearings before a subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong., 2d sess., pp. 113–114.

The Indian Business Development Program operated at the authorized level of $10 million in 1975. These funds supported 591 grants which averaged $16,260 per grant and only $8.5 million was requested in both 1976 and 1977.

The Economic Development Administration is a grants program and will be discussed later.

The Small Business Administration (SBA) has three types of loan programs: direct loans, indirect loans, and guaranteed loans. Actually, Indian people participate only in the direct loan and guaranteed loan program because banks are reluctant to make indirect loans. A letter from SBA (1975) reveals additional Indian difficulties:

> * * * corporations chartered by Indian tribes to carry out business projects are not eligible for SBA assistance unless such businesses are incorporated under State law. If the private profit subsidiary will operate within the private enterprise system, i.e., operate for a profit, pay corporate taxes, and produce distributable income for its stockholders, it would be eligible * * * it is our opinion that, unless a business entity is formed subject to the laws of a particular State subject to the taxes and regulations of like enterprises, that business entity is not operating within the competitive free enterprise system which is contemplated by the Small Business Act.

Thus, a tribally owned business would not qualify for an SBA loan because it is outside the system.[109]

The Economic Development Administration has been most supportive of Indian economic development through an annual budget of $20 million. According to table VII EDA has invested $208 million since 1966 in public works such as water, sewers, and industrial parks, business loans, planning grants, and technical assistance.

The funds allocated for Indian programs in the Department of Agriculture are not adequate to meet the needs of tribes. The amount allocated for land consolidation, although helpful for some of the larger tribes that can afford to pay the interest rates, is insufficient in amount even for them. When you add to that the Departments' policy of requiring the tribes to prove an expected profit on the land they expect to purchase, the number of tribes that can participate in the Departments land consolidation program becomes very small.

If one were to compare the approximate $10 million per year that is appropriated to the total needs of land consolidation one would find that the amount is totally inadequate. For example, on one reservation alone—the Standing Rock Reservation in North and South Dakota—

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[109] In a Library of Congress, Congressional Research Service—Analysis on Eligibility of Indian-owned businesses for SBA Assistance, it was stated "nothing in the language, spirit, or legislative history of the Small Business Act would appear to require imposition of such criteria" therefore the opinion of SBA is highly questionable.

there was identified an approximate $10,161,100 worth of land that non-Indian landowners wished to sell to the tribe.[110] Taking that amount needed for one tribe and multiplying it against the needs of all the tribes and we could figure approximately 200 years before basic land consolidation can take place for all the tribes.

Discussed earlier in this chapter, in the section on agriculture, it was pointed out how inadequate the funds in the Department of Agriculture were in regards to agricultural extension service, therefore there is no need to go into detail here, suffice it is to say that the amount **appropriated is seriously deficient.**

RECOMMENDATIONS

The Commission recommends that:

Congress enact legislation designed to:

1. Amend 25 U.S.C. sec. 1522 to increase the $50,000 limitation on nonreimbursable grants to Indian-owned economic enterprises.
2. Insure that funds and technical assistance available through SBA's "8(a) Program" (25 CFR sec. 124.8 et seq.) and "7(a) Program" (25 CFR sec. 1221 et seq.) are extended to businesses which are chartered or operated by tribal governments.
3. Insure that the technical and management assistance available through OMBE is extended to Indian business enterprises on the same basis and with the same priority as it is extended to other minority business enterprises.
4. Provide that the tribal government may waive its immunity from suit.

Congress hold oversight hearings to determine the feasibility of the establishment of an Indian Development Bank to provide for the demand for capital in Indian country and at the same time recognize and compensate for the unique requirements of lending in Indian country necessitated by the U.S. trust responsibility. A carefully considered development bank project may go a long way in reversing the existing dependency structure in Indian country thereby reducing Federal transfers over the long run.

INVESTMENT OF INDIAN TRUST FUNDS BY THE BUREAU OF INDIAN AFFAIRS

An obligation of the Federal Government's trust responsibility to Indian people is the efficient management of the Indian funds under its control. That responsibility has been delegated to the Bureau of Indian Affairs, BIA Branch of Investments, located in Albuquerque, N. Mex., which administers the investment of those Indian funds under Bureau control. Three specific categories of funds are subject to their control.

Tribal trust funds are revenues from the sale or lease of trust resources, claims awards, judgment funds, interest from investments made by the Bureau, interest from deposits held in the U.S. Treasury, and other payments made to tribes which are required by law to be deposited in the U.S. Treasury. Other tribal funds which derived from similar sources, but which are not legally required to be deposited in the Treasury, may be deposited into these trust fund accounts at the tribe's option. Accrued interest from all of these accounts is deposited in separate interest accounts, and interest is not paid on such accounts. In other words, interest does not accrue interest. This procedure is questionable in light of the Federal trust responsibility since interest should be compounded for maximum benefit. Approximately $440 million of tribal trust funds were subject to this BIA procedure in fiscal year 1975.

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[110] Special report to the American Indian Policy Review Commission by the Standing Rock Sioux tribe.

Indian Service Special Disbursing Agent Funds (ISSDA) and/or Individual Indian Money (IIM) accounts are primarily those funds of minors, adults under legal disability, income from tribal operating funds, income from individual trust land, and special deposits of advance contract payments for the use of Indian natural resources. Funds in this category in fiscal year 1975 totaled $138.1 million. These funds earn no interest while on deposit in the U.S. Treasury. They must be withdrawn by BIA Branch of Investments and invested in order to provide any return.

Indian Money, Proceeds of Labor (IMPL) funds are revenues from Indian agencies and schools, and miscellaneous funds not identified as belonging to an individual Indian or tribe. Individual Indians and tribes have no direct access to these funds. While on deposit in the U.S. Treasury, IMPL funds earn no interest; they must be withdrawn and invested before any interest may accrue. Some $11.4 million was under BIA Branch of Investment control in fiscal year 1975.

No problem exists when the Branch of Investments is able to withdraw and invest these funds prudently. They have been very successful in obtaining a relatively high rate of return. A problem does exist, however, with respect to investing Indian trust funds in certain fully insured Government securities which the Office of Management and Budget has decreed to be "budgetary outlays;" by this declaration, OMB has prohibited investments of these funds. A recent judicial decision has established that such "internal accounting policies" are to be disregarded by the Bureau when trust funds are invested.

A further problem is the insufficient rate or total nonpayment of interest on some Indian trust funds on deposit in the U.S. Treasury. Obsolete Federal laws prevent the payment of an up-to-date interest rate on these funds and preclude the payment of any interest at all on certain trust fund accounts.

New legislation and/or consolidation and updating of the present statutory authority for payment of interest upon Indian trust funds is imperative. The affirmative duty of the BIA to invest Indian funds must be emphasized. Until all trust funds are actively invested and yield the maximum rate reasonably possible, the BIA is breaching its fiduciary duty to Indian tribes and Indian people.

RECOMMENDATION

The Commission recommends that:

Congress hold oversight hearings regarding investment of trust funds to determine what legislation is necessary to assure that trust funds draw full interest at prevailing commercial rates.

Enterprise Development Efforts

A number of Federal Government programs have been created to promote enterprise development on reservations. These have ranged in scope from the potentially broad activities of the Economic Development Administration's Indian programs to the narrow responsibilities of the Office of Minority Business Enterprise. Together they have provided planning, technical and management assistance, capital, infrastructure and promotional efforts. These programs have undoubtedly made some progress toward economic development on reservations, but have failed far short of the effort required.

The programs promoting enterprise development are not examined in detail because several recent reports adequately cover the problems which exist in this area.[111] Many of the problems encountered directly or indirectly by these programs have also been dealt with elsewhere in this report. These relate to the reservation economic environment and Indian control, the inadequacy and constraints on capital provided and categorical nature of some of the programs themselves. Many of these programs have attempted to promote a particular type of development on reservations. The failures encountered reflect less on the potential for reservation development than on the approaches attempted.[112]

An attempt to industrialize the reservations began in 1955 when BIA initiated a program to attract industry to locate on or near Indian reservations. The objective was to provide Indians with employment opportunities. In setting up the industries the non-Indian usually supplied the management and working capital, and the reservation supplied the labor and sometimes the physical capital, and the BIA gave on-the-job (OTJ) subsidies. In 1968 Sorkin evaluated this program and found that 137 enterprises had been attracted, 27 had closed down and 110 were still operating. The labor force was equally divided between Indian (4,112) and non-Indian (4,375). Most of the plants were established during 1964–68 when the Vietnam War had accelerated the demand for electronics parts. Sorkin found that one out of five failed because of inexperienced management and insufficient capital, input which non-Indians were supposed to provide.[113] With the data available from the BIA we have not been able to adequately trace the results of the program from 1968 to 1975. However, in interviews with the directors of the business development program, the response was that plants were still folding and for the same reasons: inexperienced management and undercapitalization.

The BIA's recently established Indian business grant program, established under the Indian Finance Act, has been discussed earlier under capital. The capital grants available under this program may alleviate some of the problems discussed earlier for the establishment of small Indian enterprises. Generally, however, the program must be viewed as inadequate in scope and subject to the same constraints as other BIA development programs.

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[111] GAO report, "Improving Federally Assisted Business Development on Indian Reservations," June 27, 1975.

[112] "Minority Enterprise and Allied Problems of Small Business," hearings before the Subcommittee on SBA Oversight and Minority Enterprise of the Committee on Small Business, House of Representatives, July 8, 9, 10, 1975.

[113] Sorkin, A., American Indians and Federal Aid, Washington, D.C., Brookings Institution, 1971, p. 118.

In 1966 the Economic Development Administration replaced the Area Redevelopment Administration and continued the attempt to bolster local depressed economies. Since that time EDA has spent $231 million or $23 million annually on Indian programs. EDA's program is much more flexible than BIA's program of business development. EDA has invested in public works such as water, sewers, and industrial parks. Business loans, planning grants, and technical assistance are also available. This distribution of funding was as follows:

	Percent
Industrial parks, $17,126,113	7
Other public works, $173,926,993	75
Business loans, $16,509,204	7
Planning grants, $14,359,463	6
Technical assistance, $9,447,965	4

How EDA decides to distribute its funds is the subject of a special task force report which is contained in the appendix of Task Force Number Seven's report.[114]

Some EDA projects have more of an impact in terms of creating income and employment than others. If we consider the industrial park program, only 45 companies have located in the 42 parks which have a total acreage of 3,487. These 45 firms employ 1,200 Indians. The cost of creating these jobs was $14,000 per job not including business loans or wage subsidies. Although it appears excessive, it is not if one considers the average industry cost of $25,000 per job. Of the 32 reservations in the sample, five had industrial parks, but not occupants.

It has long been recommended that industries which use the natural resources be promoted. EDA has recently begun to examine the characteristics of the plants that fail and they found that they had the highest success rate with tribally owned resource based industries. Hopefully, EDA will continue to collect statistics so that this pattern can be verified.

When the composition of reservation enterprises was analyzed, we found that most of the enterprises were commercial, again with an emphasis on tourism and recreation. Among the 32 reservations, there was a total of 81 tribally owned enterprises; 36 percent were based on the natural resources, 58 percent were commercial or construction establishments and only 5 percent manufacturing a nonresource product. Sixty-three percent of all tribal enterprises were established with the help of EDA and BIA loans and grants. At the same time there were 21 major non-Indian enterprises: 47.6 percent were based on a natural resource: 14.3 percent were commercial; and 38.1 percent manufactured a product not based on reservation resources.

RECOMMENDATION

The Commission recommends that:

Congress hold oversight hearings with the Economic Development Administration, Small Business Administration, Office of Minority Business Enterprise, Department of Labor, Bureau of Indian Affairs, and Department of Transportation to determine what the obstacles are to successful business development in and near Indian communities.

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[114] **Task Force No. 7, Final Report, AIPRC, Washington, D.C., July 1976, p. 149.**

CHAPTER EIGHT

COMMUNITY SERVICES

No recitation of cold statistics can adequately portray the human misery and suffering experienced by the majority of Indian and Alaskan Native peoples on reservations and in numerous villages in Alaska. However, when the impact of these statistics is measured against the unfulfilled hopes and aspirations of scores of Indians which have been cut short by unnecessary illnesses and deaths, and against the alarmingly high number of Indian families which have been devastated by social disintegration caused by mental illness and alcoholism, then such conditions become real and meaningful.

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CHAPTER EIGHT

COMMUNITY SERVICES

INTRODUCTION

The unique position of many Indians as State residents living on or near Indian reservations under Federal jurisdiction has complicated U.S.-Indian relations in many ways. Nowhere, however, has the relationship between the governed and the government been more muddled or more neglected over the years than in the social services—health, education, and welfare.

Indians have shorter life spans and are far more susceptible to some disease than the general population, but Federal health care policy has been weak and inconsistent. The tribes lack the resources to provide health care and non-Indian local governments often refuse to provide it on the grounds that it is a Federal responsibility.

Indians receive less opportunity for formal education than the general population and Federal education programs are not appropriately directed to remedy this situation. Though the States are willing to accept Federal money for the education of Indian children they are unwilling to use those Federal dollars to develop remedial programs specifically designed to meet the needs of Indian children.

Indians have lower average incomes and higher unemployment rates than the general population, but must contend with an ill-defined, and at times conflicting system of welfare programs on four levels—Federal, Federal-State, State-local, and tribal. While a number of State and Federal agencies are authorized to deliver services to Indians, in practice Indians do not receive many of the services from these agencies of disputes over where the primary responsibility lies. Conflicting eligibility requirements further exacerbate the problem.

The problems of Federal vs. State and local responsibility for Indian social services would be less critical if either had sufficient funds to contribute significantly to health, education, and welfare programs. But even Federal programs, set up for the sole purpose of providing Indians with social services, must operate with insufficient funding, inadequate staffs, and second rate facilities.

GENERAL DATA

The physical health of the American Indian is considerably lower than that of the general population. Indians suffer from a high incidence of preventable, environmentally caused disease and from nutrition-related illnesses such as malnutrition, obesity, tooth decay and maternal and infant sickness. Treatment of both categories of disease requires detection and followup procedures which are especially difficult in the highly dispersed Indian population.

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In addition to physical disease, the lingering and cumulative effects of forced displacement, cultural conflict, and high rate of unemployment all contribute to a high level of mental health problems. This is evidenced by excessive use of alcohol and drugs, and by related social problems such as child neglect, broken homes, and violent and accidental death.

Data on nonreservation Indians is incomplete, but death and disease statistics for reservation Indians are accurate and current.*

They show that in 1970, Indian life expectancy was 65 years, compared with the national average of 71 years. Indian infant deaths in 1971 were 23.8 per 1,000, compared with 19.2 in the general population. In the same year, Indian deaths from diarrheal disease were at a rate four times higher than national averages. Deaths from tuberculosis were 3.7 times higher, from cirrhosis 2.9 times higher, from accidents 2.9 times higher, from homicide 2.4 times, from congential malformations 1.5, from suicide, 1.7, from certain diseases of early infancy 1.5, influenza and pneumonia 1.4 and from diabetes 1.3.

One of the most prevalent diseases is otitis media, a painful swelling within the ear. It generally occurs in children with a history of untreated respiratory infections. When drainage is obstructed by swelling, pressure may rupture the eardrum, causing partial hearing loss and life-threatening complications which can only be remedied by surgery and may require hearing aids. For example, at the Crownpoint Navajo health service unit, 2,533 school age children were screened in 1972. Of these, 34 children had hearing loss from otitis media, 41 had both eardrums perforated, 106 had one eardrum perforated and 11 had a growth on the bone structure behind the ear or in the middle ear.[1]

Although each case required surgery or rehabilitation, no coordinated action was taken by the screening center to get the children to a treatment facility. The chief of otolaryngology for the Navajo area estimated that in 1973 about 6,000 Navajos, or about 5 percent, needed ear surgery. There and elsewhere there is a current backlog of cases needing such surgery. A General Accounting Office survey team said after visiting Crownpoint in 1973 that at the rate ear surgery was being performed—four a week—it would take 30 years to treat the backlog.[2]

Respiratory diseases such as pneumonia and influenza also hit Indians harder than the general population—causing death at a rate 2.4 times higher in 1972. The same year, the mortality rate for Indians from bronchitis, emphysema and asthma was 5.4 times higher than national averages. Tuberculosis, caused by overcrowding and poor ventilation, occurs 10 times as often in Indians as in all other U.S. races. Even when drug therapy is applied, followup control programs are not sufficient to prevent reactivation. Five of the health care units surveyed by a GAO survey team in 1973 were not providing such control treatment. Two health care units were unable to provide treatment for about 1,100 Indians who had positive reactions to tuberculosis tests. At the Crow Agency unit in 1972, about 25 percent of the 271 Indians in the control program were overdue for services. At Pine Ridge, about 8 percent of the 405 Indians in the control program had not received treatment and other services required in a Government tuberculosis control manual.[3]

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*The data in this section are for the years 1970-1975.

[1] "Progress and Problems in Providing Health Services to Indians," Comp. Gen. of the United States, Mar. 11, 1974, p. 26.

[2] *Ibid.*, p. 29.

The story is similar with other diseases. The Indian venereal disease rate is higher than the national average. From 1962 to 1971, the syphilis incidence rate increased by 117.6 percent and gonorrhea by 79.4 percent. Control systems are weak at the health care units and no effort is made to trace and keep records of contacts and to follow up with treatment.

Maternal and infant health are poor among Indians. Indian infants from 1 to 12 months old die at more than twice the rate of the general population. Many die unnecessarily of such diseases as pneumonia, meningitis, gastroenteritis, and accidental asphyxiation because mothers are unable to reach facilities for regular prenatal and postnatal visits.

Malnutrition among pregnant Indian women may be associated with mental retardation among Indian children. Some studies[4] suggest that malnutrition decreases the normal number of brain cells produced in an infant and can adversely affect development at every stage. Even with rehabilitation, such early growth failures are probably irreversible.

ALCOHOLISM

The most severe and widespread health problem among Indians today is alcoholism and its medical consequence, cirrhosis of the liver. The social problems caused by alcoholism create an environment from which alcohol often seems the only escape.

Alcoholism affects not just the alcoholics, but the total Indian society and family units. A 1970 report on Indian alcoholism made this statement on the widespread effects of the disease:

> Alcoholism is a costly proposition in every sense of the word. Personal health may be impaired by cirrhosis and its complications, neuro-psychiatric disorders and nutritional deficiencies. The majority of accidents, especially fatal ones, are associated with alcohol, as are nearly all homicides, assaults, suicides and suicide attempts among Indians. The loss of personal freedom and productivity, the breakup of families, the hardship and humiliation involved are considerable, although not easily measured.[5]

At the six health care units surveyed by GAO in 1973, an estimated 60 percent of the caseload was directly or indirectly related to alcohol. During 1972, 1,097 patients made 2,637 visits for episodic and habitual drinking, alcoholic addiction, intoxication, and delirium tremens. During the year, 181 patients were diagnosed three or more times for these conditions.

On one central Plains reservation,[6] 70 percent of the population over 15 years of age reported that they drank—82 percent of the men and 55 percent of the women. Children were reported beginning drinking between the ages of 9 and 17. In the age group from 15 to 19, 60 percent of the boys and 40 percent of the girls reported drinking. In a small Great Lakes community, only seven of the 74 persons over 18 totally abstained.

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[3] *Ibid.*, pp. 41, 42.

[4] Stanley M. Garn, "Biological Correlates of Malnutrition in Man," Nutrition, Growth and Development of North American Children, Washington, D.C.: U.S. Government Printing Office, DHEW Publication No. (NIH) 72.26, 1972, pp. 129–138.

[5] U.S. Department of HEW, Public Health Service, Indian Health Service, "Alcoholism, A High Priority Health Problem", a report of the IHS Task Force on Alcoholism, 1969–1970.

[6] "Report on Alcoholism and Drug Abuse", Task Force No. 11, American Indian Policy Review Commission, Aug. 1976, p. 16.

The National Institute of Mental Health reports that, in 1973, 75 to 80 percent of Indian suicides were alcohol related, two or three times the national rate. The National Center for Health Statistics reports that, in 1972, suicide was one of the three fastest rising causes of death among Indians.[7] In the Indian Health Service ambulatory patient care report for 1975, there were 84 cases of battered children on first visits, 32 of which were alcohol-related.[8]

Similar to alcoholism is the prevalence of drug abuse. In the first three months of 1974 alone, the number of drug abuse cases in Indian mental health programs jumped by almost 50 percent.

The primary responsibility for prevention, education, and rehabilitation of alcohol and drug users has been with the National Institute on Alcoholism and Alcohol Abuse. NIAAA has been funding and administering most alcoholism programs since 1972. In 1976 NIAAA was supporting 99 reservation programs at a cost of $12 million and 12 training programs at a cost of $1.6 million.

NIAAA's role was changed to one of funding only in 1976 when Congress passed S. 3184. This act authorized the Indian Health Service to take over administration of "mature" alcoholism projects beginning in fiscal 1978.[9] The change is viewed as a step in the right direction by the National Indian Health Board on Alcoholism and Drug Abuse which will provide consultation and technical assistance to make alcohol projects more relevant to Indians.

MENTAL HEALTH

Manifestations of emotional disturbance among Indians were first reported in 1928 by Brookings Institute investigators[10] who found "excessive use of alcohol, high accident rates, child abandonment, and poor social and school adjustments." As late as 1955, a Public Health Service report revealed that there were no facilities for psychiatric care of Indians beyond institutionalization in asylums,[11] and that the few medical social workers serving Indians "were not sufficient in number to meet minimum requirements." Moreover, these social workers were limited to dealing with tuberculosis patients, mothers and children with problems of physical health, and the aged, handicapped or abandoned.

The 1955 Public Health Service report failed to deal adequately with the problem of mental health. A National Institute of Mental Health team visited the same sample reservations, but "because of the shortage of time, it was not possible to collect and develop quantitative data"[12], according to the PHS report. Only two pages of the 327-page report were devoted to mental health problems, excessive alcohol consumption, high accident and violent act rates, child abandonment and desertion. "There appears to be especially intense frustration", the psychiatrists reported.

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[7] *Ibid.*, p. 16.

[8] *Ibid.*, p. 17.

[9] Alcoholism report, July 9, 1976, vol. IV, No. 18.

[10] "The Problem of Indian Administration," Baltimore: Johns Hopkins Press, 1928.

[11] Some Indians were removed to St. Elizabeth's Hospital in Washington, D.C., where many remained until their death. Public Health Service Publication No. 531, Feb. 11, 1957, p. 151.

[12] *Ibid.*, p. 151.

It was not until 1965 that a pilot mental health project was started at Pine Ridge with NIMH funding. Later, a headquarters was established at Albuquerque to provide clinical research training and consultative and administrative resources to mental health sections in reservation service areas.

Severe understaffing keeps every service area from providing more than a fraction of the needed services. Because a comprehensive assessment of needs has not been made, services are delivered on a random basis with limited resources and funds.

For instance, in the Portland area a model suicide prevention program was established. The program relies on the combined help of Indian counselors, community health representatives, social workers, VISTA volunteers, and Indian Health Service mental health staff. Although the program relies on the combined help of Indian volunteers and staff, as well as non-Indian professionals, it still lacks the necessary tools to cope with the unique and varied cultural patterns of Indian tribes. These patterns, which vary from tribe to tribe, require special education and orientation even for mental health professionals.

Availability of direct psychiatric therapy for Indians in acute crisis or with chronic emotional problems is severely limited. There are few psychiatrists and their skills are needed elsewhere in broad programs of prevention, support, and education for the community as a whole. Social workers and psychiatric nurses are equally scarce. Few area programs have enough people with the right skills to train interested Indians to take on some of the community work.

A large portion of the workload in reservation mental health clinics must be carried by the paraprofessional mental health worker. Without them, the programs could not operate at all. After brief training at Desert Willow Training Center in Arizona, they return to their communities to counsel, handle crises, provide transportation, provide administrative and liaison support and handle almost any other problems that arise. A definite need exists for local training programs with locally applicable courses to turn out more such paraprofessionals.[12a]

THE RESPONSIBILITY

Improving the health of the Indian population, and especially that portion on reservations, would be a formidable job for even the best equipped, funded, and managed health care system.

The Indian Health Service and its predecessors, which were assigned to provide health care to reservation Indians, were not equipped for the job. Even today the Indian Health Service has a severe shortage, inadequate facilities, limited funds, a backlog of unmet medical services, a poor budget and management system. Moreover, the Service is dependent upon groups which are insufficiently supportive, including other Federal agencies, State and local governments and private health contractors.

[12a] For example, three University of Colorado Medical Center psychiatric residents recently set up a program of mental health consultation to the Crow and Northern Cheyenne Reservations in Montana. They worked with hospital staff at Crow Agency; with community health nurses and workers; with community agencies such as VISTA and the Neighborhood Youth Corps; with personnel at the BIA School at Busby; and with the staff at St. Labre's School for Indian Children at Ashland. The psychiatric consultants avoided giving direct patient care and focused instead on increasing personnel sensitivity to patients and bringing staff together to work out their own problems. "Mental Health Consultation on Indian Reservations", Innovations, Palo Alto, Calif., American Institutes for Research in Collaboration with NIMH, vol. 3, No. 3, Fall, 1976, pp. 26–27.

Additionally, the Indian Health Service has functions beyond health care. It is responsible for sanitary installations, construction of facilities, fostering Indian involvement in the health care system and coordinating alternate health resources for nonreservation Indians.

For more than 50 years, Congress has been passing legislation and making appropriations designed to raise the level of Indian health, to improve the environment on reservations, and to involve Indians in the Federal health care system.

Agencies working directly or indirectly to achieve those goals started with only the Department of the Interior, but grew to include Housing, Agriculture, and Health, Education, and Welfare. Appropriations for free Federal health care for Indians increased from $40,000 in 1911 to some $274 million in 1976.

Congress has funded countless studies to measure the level of Indian health, to determine needs and to evaluate the Federal health care system. Congress has heard Indians and Indian Health Service administrators testify frequently on the cultural relevance of Federal health care, on ways to involve more Indians in it and on means to improve it.

Yet, in 1977, the Indian Health Service remains underfunded and understaffed. It lacks the flexibility to meet diversified tribal needs. Its non-Indian focus is culturally irrelevant. Indian involvement in the system, even indirectly, is minimal. Federal agencies fail to support and serve it properly.

Congress acknowledges that it has a special trust responsibility for Indian health, but it maintains a health care system which is not sufficiently funded to be the primary provider it professes to be, and with rare exception serves only Indians who live on reservations. Other Indians must rely on State and local health providers which are unreliable because of the dispute over where the primary responsibility lies.

The most recent Indian health legislation, Public Law 94–437, is not a design for comprehensive health care, even though it declares that its policy is "to effect the national goal of providing the highest possible health status to Indians." The Act does, however, provide for upgrading of the Federal health care system. It partially addresses poor environmental conditions, acknowledges the health needs of nonreservation Indians and outlines a program for the training and education of Indian health professionals.

A number of Federal agencies will be involved in implementing the Act's provisions. The Act holds the possibility for an improvement in Indian health, but fundnig will not be available until fiscal 1978 and will end with fiscal 1980. Whether the Act's appropriations will, in that time, meet total needs, remains to be seen.

THE BALANCE UPSET

The earliest European settlers in America found Indians adapted to their environment in a way which satisfied their material, emotional, and physiological needs. The lifestyles that resulted from these adaptations disappeared with European colonization. Settlers brought with them strange diseases and alcohol. Those tribes which resisted colonization found themselves in drawn-out combat. Indians living on lands the settlers wanted were removed forcibly.

Smallpox was the first Indian health problem the Federal Government recognized. Because it threatened the lives of soldiers stationed near reservations, the War Department ordered mass vaccinations. However, the vaccines often did not arrive where they were needed, and there was a shortage of doctors to administer them, despite the fact that Indian agents wrote frequently to Washington to seek both.

For the most part, the only Federal medical care Indians received during the 19th century was occasional attention from doctors hired by the Bureau of Indian Affairs to treat Federal employees and children in BIA schools.

Although a health division was created in the BIA toward the end of the 19th century, which hired some additional doctors and built some hospitals, health needs of Indians have never been adequately met.

For example, in 1921 Congress passed the Snyder Act which authorized the appropriation of funds "from time to time" for "relief of distress and conservation of health." A Brookings Institute study of Indian administration[13] reported on the continued extensive conditions of ill health that prevailed among Indians, and some 20 years later when teams from the American Medical Association were asked by the Secretary of the Interior to investigate health care on a number of reservations,[14] they reported:

> As a result of lack of sanitary conditions, many of the diseases common to white men are rampant among the Indians and require redoubled efforts on the part of the medical officers to control them. * * * If the American people were aware of the failure on the part of Congress to appropriate sufficient funds for the health of the Indians, a justified wave of criticism would sweep the country.

Ten years later in 1958, according to the Public Health Service, Indians continued to have health problems resembling in many respects those of the general population of the Nation in 1860, a generation before. Diseases largely controlled among the general population still caused widespread illness and death among Indians.

These and similar studies prompted Congress in 1955 to transfer Indian health responsibility from the BIA to a newly created body under Health, Education, and Welfare called Health Services Administration, Public Health Service.[15] It was later renamed the Indian Health Service (IHS).

After the transfer from Interior to HEW, appropriations increased, but there still was not enough money to serve both reservation and nonreservation Indians. The underlying environmental and social causes of poor health remained untouched. From the Indians' standpoint little was changed, and in 1976, as pointed out by Senator Henry M. Jackson:[16]

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[13] "The Problem of Indian Administration," Baltimore: Johns Hopkins Press, 1928.

[14] Drs. Brasch, Branton, and Chesley, "Survey of Medical Care Among the Upper Midwest Indians", *Journal of the American Medical Association*, Rochester, Minn., Jan. 22, 1949, pp. 223, 225.

[15] Public Law 83–536, 71 Stat. 370, 42 U.S.C. sec. 2001 (1954).

[16] Testimony before the Indian Affairs Subcommittee of the House Interior and Insular Affairs Committee, Oct. 20, 1975.

The deplorable state of Indian health is a matter of record. No recitation of cold statistics can adequately portray the human misery and suffering experienced by the majority of Indian and Alaskan Native peoples on reservations and in numerous villages in Alaska. However, when the impact of these statistics is measured against the unfulfilled hopes and aspirations of scores of Indians which have been cut short by unnecessary illnesses and deaths, and against the alarmingly high number of Indian families which have been devastated by social disintegration caused by mental illness and alcoholism, then such conditions become real and meaningful. Our national conscience demands that this deplorable health picture be corrected.

The Health Care System

As U.S. citizens, Indians are entitled to the entire range of health services available to the entire population. However, the fact is that Indian people receive the bulk of their medical care from a single Federal agency—Indian Health Service. One reason is that Indians seeking care from federally funded programs administered by State or local governments are often refused with the excuse that IHS is solely responsible for their care.

IHS, however, has neither funding, facilities, or staff to provide health service to all Indians. As a consequence, many go without any care. Like the BIA, IHS has to limit its health care to those Indians living on or near federally recognized reservations. These Indians receive direct care in IHS facilities and indirect care from private health providers contracted with IHS funds.

As the parent body of IHS, the Department of Health, Education, and Welfare controls the size of IHS staff, has final approval of its budget before it goes to OMB, and sees that the Service conforms to administrative and departmental policy. But HEW has not been an aggressive advocate of Indian health. It opposes the use of direct health care, but fails to insure Indian entitlement to alternative health care sources, such as other HEW programs and federally funded State and local programs. An obstacle to improvement is the fact that HEW regional offices do not correspond geographically to IHS area offices. There is also a lack of interagency coordination, consultation, and monitoring.

In April 1975, an Intra-Departmental Council on Indian Affairs was established within HEW. The establishment of this council was based on a recognition of the total lack of coordination of Indian programs within HEW.

Few Facilities, Poor Facilities

IHS headquarters are in Rockville, Maryland. Eight area offices administer and advise 86 service units, which actually provide health care on reservations. At the service units there are 51 hospitals with inpatient and outpatient clinics, 83 health centers and 300 field stations, including those in Alaska.

Not only is the number of these health facilities insufficient, but many are unacceptable by national standards. Thirty-five of the 51 hospitals do not now meet Federal fire, safety, and building codes. Twenty-nine do not meet Federal accreditation standards, either because of poor physical plants, inadequate staffing or deficiencies in equipment supply.[17]

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[17] Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, U.S. Senate, 93d Cong., 2d sess., Sept. 16, 1974, p. 5.

In 1974, an Indian health bill introduced by Senator Jackson described IHS facilities as "inadequate, outdated, inefficient and undermanned".[18] The same bill pointed out that 57 areas with Indian populations required "either new or replacement health centers and stations, or clinics remodeled".[19]

One tribal chairman, Henry L. Allen, described the Pawnee, Oklahoma, service unit as follows:

> There is just no way you can justify continuing the hospital or even calling it a hospital. It is obsolete. It was built around the first of the century. It has been there these many years. We keep modifying this old facility and it will never be adequate for the present needs of the people, who number 12,000 to 18,000 . . . with four doctors.[20]

The following engineering report was written on the Winslow, Arizona, IHS hospital, one of four unaccredited facilities viewed by Senate investigators:

> This is a three-story, heavy double reinforced concrete building. It was built in 1933 as a tuberculosis sanitarium. The facility is now a 40-bed acute care hospital. Not one room in the building was designed for the use it is now put to. There is no chance for proper nursing care, proper nursing procedure, or proper asepsis. With the possible exception of the kitchen, every department of this hospital is critically inadequate for acute patient care. Because of structural limitations, it is unfeasible to remodel or expand this building.[21]

IHS delivers the bulk of its direct care in the outpatient clinics of its hospitals and it is there that the Indian patient most often suffers from the inadequacies of the system. Patients who have traveled long distances often wait several hours for only a cursory examination. One Navajo facility with four examining rooms has an outpatient load of 60,000 visits a year. A single X-ray machine performed 27,500 exposures in 1 year, even though the safety standard is 5,000 exposures.[22]

Some new methods of providing medical care are being explored. For example, mobile health vans are being used experimentally on the Navajo and Rosebud reservations. Until recently, a television satellite was used successfully in Alaska to relay a physician's diagnosis and instructions to remote, inaccessible areas staffed only by health aides.

CONTRACT CARE

To supplement its own facilities, IHS spends about a third of its budget on contract care in private facilities. Aside from the fact that IHS is unable to meet its own existing need, there are other disadvantages to purchasing contract care.

In some instances, contract medical care may be uneconomical. In addition, contract care suffers from a lack of monitoring of reported discriminatory practices among some doctors and hospitals. Such monitoring would be difficult under the best of circumstances, but many contracted facilities are far from reservations, and IHS has neither the formal means nor the staff to perform that function.

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[18] S. 2938, 93d Cong., 2d sess., Feb. 1, 1974, sec. 2(f)(1).

[19] Ibid.

[20] Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, U.S. Senate, 93d Cong., 2d sess., Sept. 16, 1974, p. 53.

[21] *Ibid.*, p. 35.

[22] Testimony of Dr. Taylor McKenzie, Executive Director, Navajo Health Authority, before the Permanent Subcommittee on Investigations of the Committee on Government Operations, U.S. Senate, 93d Cong., 2d sess., Sept. 16, 1974, pp. 58–59.

In addition to direct and contract patient care, IHS also offers on a random basis (dependent upon available funding and staff) various outreach and community oriented programs in public health, maternal and child health, nutrition, and hygiene. If such programs were operating on a large scale, the limited service which IHS can give would be enhanced considerably. Since they are not, IHS' task is more difficult than it need be.

IHS STAFFING

Like its predecessors, IHS is chronically short of personnel, both professional and supportive. Isolation in an alien culture, lack of educational and recreational facilities, low-pay, separation from professional colleagues, inadequate and substandard housing—all of these factors make recruitment difficult and turnover high.

Of those who do accept IHS work, many have had only superficial exposure to public health work, and little if any knowledge of Indians. Often these employees are not sufficiently oriented before going to their posts and may experience severe culture shock. Doctors and nurses who stay on find it difficult to integrate socially with the Indian community, have excessive workloads in ill-equipped facilities, and become frustrated with patients who are often unresponsive and hostile to non-Indian medical methods.

IHS has generally relied for staff needs on the Public Health Service, which many professionals chose in lieu of military service under the draft. Despite the fact that this option no longer exists, IHS has not offered incentives of any kind to professionals from other sources. In the recent past, a few foreign medical school graduates were hired [23] to fill this gap, but they lack command of either English or any Indian language and further aggravate existing frustrations which Indian patients experience in seeking culturally sensitive treatment.

Two-thirds of the IHS hospitals, four-fifths of its outpatient clinics and half of its health centers are understaffed—meeting only 80 percent of staffing standards for their respective services.[24] The IHS ratio of health professionals to population shows the IHS lagging behind the national average in every category:[25]

	Current ratio	Recommended ratio
Physicians	1/938	1/700
Dentists	1/2,800	1/1,650
Otolaryngologists	1/120,000	1/20,000
Audiologists	1/480,000	1/30,000
Ophthalmologists	1/54,200	1/12,000
Optometrists	1/69,714	1/10,000
Pharmacists	22/100,000	65/100,000
Social service workers	1/7,283	5/10,000
Registered nurses	207/100,000	458/100,000
Public health nurses	29/100,000	40/100,000

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[23] Congress recently declared in the 1976 Health Professions Educational Assistance Act that "there is no longer an insufficient number of physicians and surgeons in the United States such that there is no further need for affording preference to alien physicians and surgeons in admission to the United States under the Immigration and Nationality Act". New York Times, Jan. 14, 1977.

[24] S. 2938, 93d Cong., 2d sess., Feb. 1, 1974, sec. 2(f) (2).

[25] IHS Office of Program Statistics.

The Service also has a shortage of support staff, such as paraprofessionals, technical aides and assistants, to the extent that professionals are obliged to perform many of the functions that should be done by assistants. Further, IHS hospital administrators report that nurses frequently cannot maintain continued surveillance of any given section because they must move one to another in any given work shift. "Infants have died because there was nobody to take care of them," according to Dr. Taylor McKenzie, Executive Director of the Navajo Health Authority.[26]

The testimony of Alan Yamashita, Fort Defiance Unit Director, is but one of many similar accounts given to a Senate investigative committee:

> This administration has been informed of a number of incidences where the safety of patients has been placed in jeopardy. For example, on August 21, 1974, there were only two nurses (RN and LPN) on the 4:00–11:00 p.m. shift in the OBGyn Department. These individuals had the responsibility of caring for 16 patients. During the evening shift there were four OB admissions and two deliveries. In addition to this, there was a baby in an isolette in the transitional nursery which had to be observed at all times. They requested help, but because of the nursing shortage in other departments, could not be helped until around 11 p.m. Therefore, with no help in sight, deliveries continued but no postpartum checks were made, and no infants in the nursery were observed. The results could have included postpartum hemorrhage on the unobserved mother, apneic spells, and/or the death of an infant. The total OBGyn census at the end of the evening shift was 22.[27]

This statement by IHS Director Dr. Emery Johnson to the same investigating committee sums up the typical staff situation: "There is no way that a single nurse, for example, can adequately watch the labor room, the newborn nursery, the intensive care nursery, and sometimes even have to cover the emergency room. There is no way."[28]

In addition to its numerical shortcomings, IHS staff is often insensitive to the needs and values of its Indian patients. Professionals, for example, are generally non-Indian, as are administrators.[29] IHS efforts to employ more Indians have been generally unfruitful. Adherance to Indian preferance and employment policies which date back to the 1800's,[30] has been opposed time and again by non-Indian employees who feel it discriminates against them.

Service training programs have been equally ineffective. Most are only for clerical and technical workers and practical nurses, and they are located away from the reservation.[31] In the case of the START program (geared to GS–1–5 level) and the Upward Mobility program (geared to a GS–7 level), the supplementary inservice training students are supposed to receive from IHS superiors is rarely given because professionals cannot take time from heavy workloads for such purposes.

Community health representatives questioned by the Health Task Force[32] indicate that their IHS training is inadequate. Seventy-four percent of the respondents said they needed training in the administration of drugs; 78 percent in symptom identification; 70 percent in emergency medical care; 65 percent in psychiatric crisis intervention; 54 percent in lab sample testing; 67 percent in midwifery; 68 in communicable disease control and prevention.

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[26] "The Navajo Nation: An American Colony," a report of the U.S. Commission on Civil Rights, Sept., 1975, p. 107.

[27] Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, U.S. Senate, 93d Cong., 2d sess., Sept. 16, 1974, p. 66.

[28] *Ibid.*, p. 73.

[29] IHS employs only three Indian doctors of a total of 486; only 15 of the Service's 84 service units have Indian directors. IHS figures, Apr., 1973.

[30] *See*, e.g., Indian Trade and Intercourse Act, June 30, 1834, 4 Stat. 729, sec. 9.

[31] Desert Willow, Santa Fe, and Black Hills.

[32] Survey of 285 CHRs, June, 1976.

IHS funds training for Indians to become licensed practical nurses at schools in Rapid City, South Dakota, Shiprock, New Mexico, and Albuquerque, New Mexico. But no such programs are at present offered for the training of registered nurses, although efforts have been made to utilize nearby colleges for this purpose.

While IHS training programs are conceptually sound, they are too few in number to begin to meet the service population's needs, and they are not geared to specific tribal situations.

Indians are not using the training programs to any significant degree because of the hardship of traveling to training centers and other reasons. The Health Task Force, in a study of the IHS management system, found Indians frustrated with the Service's selection methods: there is favoritism shown; there is no overall plan geared to a systematic filling of staff gaps; information concerning the training programs is inaccessible; and application procedures are complex.

The use of medicine men and women to alleviate staff shortages is accepted by IHS in a limited way, varying from unit to unit. The idea meets resistance both from Indians and non-Indians in some areas. In other cases, skeptics who have agreed to try a combination of traditional and Anglo medicine have met with success. The possibilities for use of this resource have not been sufficiently explored, partially because of the lengthy, expensive training involved. A single school operates at Rough Rock in the Navajo area as a demonstration project. It began in 1969 with funds from NIMH.

IHS BUDGET

In addition to its staffing and facilities problems, IHS is plagued with an inefficient budget and management system. Administrators are always concerned whether the Service can survive each time Federal policy changes or health responsibility is shifted to a different agency. Dependence on congressional appropriation is another source of anxiety. These factors—combined with pressing, critical needs at the unit level—have an effect on management efficiency.

Congressional appropriations for IHS are based, not so much on changing and diversified service unit needs, but rather on the amounts allocated in the previous year in specific health categories. IHS, HEW, and OMB together prepare an annual budget for congressional review. Congress then appropriates funds in four categories: patient care, field health services, construction, and program management. IHS feels obliged to spend funds as Congress specifically directs, even when this means that unit needs may not be optimally met.

Headquarters then allocates to areas, and areas to service units, according to their previous budgets, and, to some extent, their projected needs. When service units and area offices prepare their individual budgets for submission to IHS headquarters, they set priorities based on their needs, but realize that headquarters allocations will be made within the limits of what Congress has appropriated.

There is never enough money to eliminate the Service's backlog of unmet needs and also to meet on-going needs. IHS, therefore, has to do the best it can with limited funds.

The number of positions a service unit has is also fixed in the budget mechanism. IHS received an increase of 500 positions in fiscal 1971, and these were divided by headquarters equally between field health and patient care. Additional positions continue to be distributed equitably among area offices, who, in turn, allocate to service units.

Such a budget system has a deadening effect on service unit directors, who have no flexibility in planning programs to meet the specific needs of their patients.

INDIAN INVOLVEMENT IN IHS

In theory, Indians have close involvement with the service which delivers health care to them. In practice, however, Indian involvement is uneven, with considerable variance from tribe to tribe. The Administration, the Congress, and IHS have all indicated support for the concept, but it is difficult to implement, even though both IHS and tribes have developed mechanisms for that purpose.

Tribes have advisory health boards and departments; IHS has a Division of Indian Community Development (DICD) and an Office of Tribal Affairs. DICD is supposed to participate in servicewide executive policy formulation and execution; advise on the operational implications of the Service's plan, programs and operations; provide servicewide leadership in program operations and internal coordination in relation to Service goals, objectives, policies and priorities; provide direction and coordination for day-to-day operations of area offices. OTA is supposed to participate in the servicewide executive policy formulation and execution; coordinate the development of optimal, supportive relationships with tribal governments, intertribal governing bodies, national Indian interest groups, and other individuals and groups interested and active in Indian affairs; advise on the tribal affairs implications of Service policies, plans and programs and operations. The Director of IHS has as one of his functions "developing individual and tribal capacities to participate in the operation commensurate with means and modalities which they deem appropriate to their needs and circumstances."

Neither of the IHS structures has staff or budget at area and service unit levels and, therefore, cannot implement their functions to a significant extent.

Advisory Indian Health Boards were established at service unit levels by a number of tribes in the early seventies in an effort to make IHS delivery more responsive to tribal values and traditional healing methods. The Board concept has since expanded to the area and national level with a budget of $244,000 supplied by IHS (the very body that boards are to evaluate, monitor and criticize), but it continues to operate in a somewhat unstructured fashion with insufficient resources, funds, or expertise. Its members often are unpaid volunteers who deal with grievances, orient new IHS staff, provide liaison between IHS and Indian people, handle individual patient complaints, strive for more cultural sensitivity on the part of IHS staff, and let the Service know what their priorities in health service are. Testimony given to the Health Task Force[33] indicates that these lay board members feel at a disadvantage with IHS professionals; are ineffectual because they are funded out of service unit budgets, if at all; and have no real authority vis-a-vis IHS.

Tribal health departments generally have greater funds and full time staffs, but they too are funded by IHS. These departments coordinate tribal health programs which IHS buys by contract for use by its service population. Since tribes run these programs, they have the authority to hire staff and set policy. Moreover, their existence, unlike the advisory boards, is authorized by law.[34]

A comparison between tribal involvement mechanisms (health boards, health departments, and contracting) and those operative for the non-Indian population (Health Service Agencies) highlights the weaknesses in the Indian involvement system.

Health Systems Agencies were created by the National Health Planning and Resources Development Act of 1975.[35] Each of these agencies receives direct funding from HEW for a staff of no less than five professionals with expertise in administration, data gathering, health planning, and health resources development. The functions and authority of these agencies is spelled out in the Act which created them: they have review and approval authority over proposals for various kinds of federally funded programs. They are authorized to develop health plans indicating the kinds of health services needed to increase the accessibility, acceptability, continuity, and quality of health delivery in their areas. They receive technical and consultative assistance from Centers for Health Planning (also funded by HEW) to aid them in developing innovative approaches to health care delivery.

The Act which created Health Systems Agencies specifically exempted tribal health programs from HSA authority, in order to preserve tribal sovereignty and guard against State jurisdiction. This means, however, that these monitoring and evaluative mechanisms cannot presently be used vis-a-vis IHS, and that tribes are still without adequate resources and capability for doing so. It appears that tribal attitudes concerning IHS are transmitted to Congress primarily through the avenue of committee hearings, which set obvious limits. It is clear that tribes need a program comparable to HSA, perhaps one modeled after it, with non-Indian medical associations providing technical assistance and guidance until there are sufficient Indian health experts available to take over those roles.

Indian involvement is likely to increase as tribes begin to implement the Indian Self-Determination and Education Assistance Act passed in January of 1975. The Act authorizes grants to tribal governments for the purpose of evaluating, monitoring, and restructuring present programs for greater flexibility to service unit needs and priorities. The Act also will permit tribes, through grants, to design their own programs.

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[33] Report on Indian Health, AIPRC, Washington, D.C.: U.S. Government Printing Office, July, 1976, pp. 131–132.

[34] Buy Indian Act (25 U.S.C. 47, 1834); and the Indian Self-Determination and Educational Assistance Act (Public Law 93–268).

[35] Public Law 93–641.

THE IHS PATIENT

The shortcomings of IHS' delivery system are keenly felt by its recipients, the Indian people. In testimony to the Health Task Force,[36] patients told of traveling long distances to facilities, having to wait several hours to be seen, and, finally, receiving but cursory examination. Often patients are denied needed services simply because IHS lacks the staff or equipment to provide them. As inpatients, Indians frequently receive improper care because of staffing and facility inadequacies. In the words of Dr. Emory Johnson, IHS Director, "The main concern (of doctors and nurses) is one of being unable to respond to patients with the quality and quantity of care that they know from their training and from their experience is required.[37]

But the overriding dissatisfaction Indian people have with IHS is its non-Indian orientation, staffed as it is mostly with non-Indian doctors practicing non-Indian medicine. It is the Indian patient who has had to adapt, rather than the other way around. Most Anglo doctors and nurses are not knowledgeable of Indian culture and values and are therefore insensitive to the needs of their patients. Indian people feel that this creates a barrier to effective treatments. They may be frightened and uncomfortable with "scientific" methods and could respond more readily to treatment which is relevent to their traditions.

IHS staff is aware of the problem and is frustrated by the resistance and hostility of Indian patients. Yet IHS has done little to seek out and hire traditional practitioners. It was, instead, the National Institute of Mental Health which in 1966 funded the first and only traditional medicine training program now in operation.[38] It is still only a pilot project in which medicine men draw salaries for their teaching and students earn a small hourly allowance. IHS psychiatrists, in particular, are enthusiastic about the program, even though some had reservations at the beginning. Dr. H. C. Townsley, chief of IHS Mental Health Programs, told the Health Task Force in 1976 that his staff had learned to consult with traditional healers whenever possible, because it helps them to understand patient needs. Townsley feels that traditional, ceremonial techniques work better with emotionally disturbed Indians than non-Indian symptom-based therapy. Clearly, there is a need in IHS for traditional healers. Working in combination with non-Indian doctors, they can see that Indian patients are given the kind of medical care they can respond to.

ALTERNATE HEALTH CARE SOURCES

For those Indians who are excluded from the IHS delivery system (members of nonrecognized tribes and urban and rural Indians, members of recognized tribes not living on reservations), there are, theoretically, alternative sources of free health care. But actual use of these sources is often denied to Indians simply because they are Indians and despite their citizenship rights to such services. With the eventual advent of National Health Insurance highly probable, it is important that the Indian right to alternative health sources (other than IHS) now be firmly established and assured. Health providers other than IHS, at every governmental level, claim that Indians are the sole responsibility of IHS and that they do not have the funds to serve Indians. Some of these alternate providers are county hospitals, mental institutions, various children's services, and vocational rehabilitation services, as well as financing mechanisms such as the Veteran's Administration, workmen's compensation, medicaid, and medicare. Either Indians are excluded from these programs, or, as in the case of medicaid and medicare, discouraged from their use by complex reimbursement and eligibility barriers.

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[36] *See* hearings transcripts, Health Task Force, AIPRC; Phoenix, p. 22; Oklahoma City, pp. 46, 94, 104, 140; Billings, pp. 6–12; Navajo, p. 17.

[37] Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, U.S. Senate, 93d Cong., 2d sess., Sept. 16, 1974, p. 73.

[38] Located at Rough Rock, Navajo Nation.

This situation exists despite the fact that HEW has declared that recipients of Federal financial assistance may not deny health services to Indians on the grounds that IHS services are available. Moreover, IHS, Office of Civil Rights, and the Medical Services Administration (MSA) entered in a triagency memorandum of agreement in 1973 on Indian eligibility rights to federally funded programs. IHS agreed to determine how many Indians are eligible for non-IHS federally funded programs; to furnish OCR with a list of Indians who have been refused service in such programs; and to publicize among Indians the availability of such services. IHS has been unable to keep any of these promises to any significant extent because it lacks the funding and staff to do so. Without convincing evidence from IHS,[39] OCR, in turn, has not been able to perform the monitoring and enforcement functions it agreed to in the triagency memorandum.

MSA, which agreed to help non-Indian health-resource agencies with procedures necessary to firmly establish such eligibility, has not done so, according to testimony at Health Task Force hearings,[40] because no agencies have requested such help.

Health Task Force hearings further revealed that urban Indian health centers (where complaints of discrimination are most likely to be heard) knew nothing of the memorandum because none of the three agencies had told them about it. OCR gave the excuse that it is overburdened with other responsibilities and does not have funding to carry out the memorandum agreement. IHS declared that it is preoccupied with pressing medical problems. Clearly there is a need in HEW for a funded and staffed monitoring and enforcement body to implement the plan which the three agencies set up but are unable to carry out. But the poor living conditions on Federal reservations, often fixed in colonial economies, are directly attributable to the failure of HEW, HUD, and BIA to eradicate them.

HOUSING: THE UNMET NEED

Providing every American family with safe, adequate housing has been the goal of the Federal Government since 1949. More than 25 years later that goal has not been attained for its citizens and in particular for Indian people. Table one demonstrates the disparity between national and Indian housing statistics.

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[39] Only seven charges of discrimination have been reported by IHS since the agreement was made in 1973. One of the charges was made after an Indian was denied care from a non-Indian facility and subsequently died. "Report on Indian Health," AIPRC, Washington, D.C., U.S. Govt. Print. Off., Sept., 1976, pp. 138–139.

[40] *Ibid.*, pp. 139–140.

TABLE 1.—SELECTED CHARACTERISTICS OF INDIAN HOUSING

Selected characteristics	Indian (percent)	National (percent)
Housing units over 30 years of age	40.9	40.5
Lacking plumbing	26.3	5.5
With plumbing but crowded	16.4	6.9

Source: U.S. Bureau of Census, 1970 Census of Housing, HC(7)-0 "Housing of Selected Racial Groups," HC(7)-1 "Housing Characteristics by Household Composition," and HC(2)-1 "Metropolitan Housing Characteristics."

While the above figures are illuminating, a better understanding of the magnitude of the problem can be gained by examining BIA housing statistics. Table two is an inventory of housing by BIA area offices. Of the 109,255 dwelling units shown in all BIA service areas, less than half (49,560) are considered standard. A third of the total need outright replacement; slightly over one-fourth need renovating, and another 18,000 families who may be living with other families are in need of some kind of shelter of their own.

TABLE 2.—*Consolidated Housing Inventory*

[Fiscal year 1975]

Total number of existing housing units	109, 255
Housing in standard condition	49, 560
Housing in substandard condition	59, 696
Of the housing in substandard condition	59, 696
Housing units needing replacement	33, 122
Housing units needing renovation	26, 573
Total new units required	51, 065
Housing units needing replacement	33, 122
Families needing housing	17, 943

Source: Bureau of Indian Affairs, 1975.

Table three shows the BIA inventory changes between fiscal year 1974 and fiscal year 1975. Because of the movement back to the reservations, more reliable data collection procedures, expanded BIA service districts and the rapid deterioration of existing stock, present efforts are not keeping pace with the new demand and will not result in reducing the present total housing deficit. In fact, present production must more than double to eliminate the deficit within a reasonable time.

TABLE 3.—CHANGES IN CONSOLIDATED HOUSING INVENTORY (FISCAL YEAR 1974–75)

Selected categories	Increase	
	Number	Percent
Number of families in service population	13, 927	12.0
Total number of housing units	13, 101	13.3
Number of substandard housing units	6, 410	12.3
Total housing need	7, 236	10.6

Source: Bureau of Indian Affairs, 1975.

Substandard housing conditions cause serious health problems for Indian people. As pointed out by Dr. Emery A. Johnson, Director of the Indian Health Service (IHS), during the 1975 Senate hearings on Indian housing, "A major element in the health status of the people is based on the environment in which they live, and a fundamental part of that environment is their housing." Dr. Johnson went on to say that "crowded living conditions, insufficient amounts of safe water, and lack of sanitation facilities are factors contributing to the poor environment in which most Indian and Alaskan Natives live." [41] Improved housing will not only contribute to the health of Indian people, but also will surely aid in the social and economic development of the reservation.

CURRENT HOUSING PRODUCTION

Shown in table four is total new houses built within BIA service areas during fiscal year 1975. If one compares the total of new homes built (4,146) with the increase in total housing units needed (7,236), it is clear that current production levels are not even meeting new demand.

TABLE 4.—NEW HOMES CONSTRUCTED DURING FISCAL YEAR 1975

	Number	Percent
HUD low rent	974	23
Mutual help	1,678	40
TurnKey III	93	2
Total	2,745	
BIA housing improvement	641	15
Flood rehabilitation	74	2
Built with credit loans	112	3
Other	574	14
Total, new homes	4,146	100

Source: Robert D. Leatherman, The Indian Housing Effort in the United States. Prepared for Task Force Number's 6 and 7, American Indian Policy Review Commission, Washington, D.C., June 1976. (See, footnote 42).

Since the availability of the public housing program to Indian people in 1962, 24,476 housing units were authorized and 17,457 have been completed for occupancy at the end of FY 1974. Between 1968 and 1975, HIP completed 4,113 new homes, and repaired 29,443 existing homes.[42]

Table five compares the Indian housing need with HUD production plus commitments. As can be seen, HUD has had difficulty in attaining its production goals. These difficulties can be divided into specific problems which affect some Indian groups more than others, and general or universal problems which affect all Indian people to the same degree.

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[41] Indian Housing, a report of the hearing before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, U.S. Senate, May 1, 1975, p. 12.

[42] Robert D. Leatherman, "The Indian Housing Effort in the United States," prepared for Task Force Nos. 6 & 7, American Indian Policy Review Commission, Washington, D.C., June, 1976.

TABLE 5.—INDIAN HOUSING NEEDS AND HUD ACCOMPLISHMENTS, FISCAL YEAR 1968–75

	1 BIA inventory, new units needed	2 HUD units, construction started	3 HUD units, completed for occupancy	4 HUD commitment
Fiscal year:				
1968	48, 866	1, 206	992	------------
1969	51, 182	1, 049	1, 523	6, 000
1970	46, 544	3, 763	1, 206	6, 000
1971	49, 840	4, 974	2, 160	6, 000
1972	48, 313	3, 111	2, 889	6, 000
1973	47, 071	2, 675	3, 788	6, 000
1974	47, 556	2, 638	3, 499	6, 000
1975	[1] 51, 065	2, 170	3, 429	------------
Total			19, 486	------------

[1] Reflects an expanded area served by BIA over previous years.

Sources:

Col. 1: Bureau of Indian Affairs Consolidated Area Housing Inventories, Housing Office, BIA.

Cols. 2 and 3: 1968, 1969—Special Report, Indian Programs (Dec. 31, 1971) (HPMC–FAR). 1970–75—Public Housing Performance Analyses (HPMC–FHA–FS).

Col. 4: 1969–73—Based on 30,000 unit commitment of the 1969 triagency agreement (HUD–BIA–IHS). 1974—Secretary Lynn, Nov. 30, 1974.

SPECIFIC PROBLEMS: REGIONAL AND CULTURAL VARIATIONS

Alaskan Natives, Eastern tribes, Oklahoma tribes, rancherias, small bands, unorganized Indian communities, southwestern tribes, and pueblos, and the Great Plains tribes each face unique problems in obtaining housing which meets their diverse climatic and cultural conditions.

Housing for Alaskan Natives must consider severe weather conditions, their dependence on a subsistence economy, a short construction season, the remoteness of the area, and the lack of local construction skills. Recognizing these unique circumstances, HUD designed a "special 500" program to provide homes to remote Alaskan villages.[42a] Even though certain HUD standards such as minimum property standards were waived, the program is not flexible enough to meet Alaskan conditions. Costs are running up to $50,000 per unit; regular inspections have been too costly; and operating costs, particularly fuel costs, are beyond the cash income of the inhabitants. However, there was one exemplary development at Fort Yukon where the local housing director further deviated from HUD design guidelines and achieved more acceptable results in terms of cost ($35,000 per unit) and climatic conditions. Clearly considerable flexibility is needed in the HUD regulations.

Most Eastern tribes, unorganized tribes, small bands and communities, and rancherias are largely excluded from HUD programs because they lack Federal recognition, trust land, or live in sparse or remote locations. Southwestern tribes and pueblos find HUD housing designs simply do not fit their traditional lifestyles. On the Great Plains reservations where land is checkerboarded[43] there is a scarcity of appropriately located usable space.

[42a] Reflects an expanded area served by BIA over previous years.

[43] *See* ch. 7 of this report for a discussion of landholding problems on reservations.

UNIVERSAL PROBLEMS

There are at least seven major problems which impede the delivery of housing to Indian people.

First, there is a lengthy development period. Former HUD Secretary, James Lynn, estimated that it takes 18 months to process a housing application to the point where a contract between HUD and the Indian Housing Authority (IHA) can be executed.[44]

With public housing, especially Mutual Help projects, HUD's time delays revolve around tenant selection and site selection. Tenants nearly always want their homes built on land previously assigned, allotted, or leased from the tribe. Only after tenants and sites are selected can HUD run an accurate cost estimate of site work, unit construction, and access roads. To expedite the processing, many HUD field offices obtain site leases or assignments in advance of the contract execution. The new housing regulations, in sec. 805,217(b), expressly provide, however, "No site may be acquired or leased and no commitment shall be made for acquisition or leasing until after execution of the contract."[45] The paradox of this situation is that an accurate contract amount cannot be determined until site costs are known; entire site costs cannot be determined until water is located; and water can only be guaranteed through drilling, which is expensive and can only be paid for out of contract funds.[46]

Second, a major impediment to the delivery of Indian housing is the unwieldy multiagency agreement among HUD, the Indian Health Service (IHS), and the BIA. The Bureau handles the preliminary work on site selection, working out the necessary leases and providing the roadwork up to the project site. IHS is in charge of providing all the sanitary requirements up to the project site. HUD provides the building and is responsible for the site work, including whatever intraproject roads and service lines will be needed to connect the homes with the roads and sanitary lines delivered to the project by BIA and IHA. Certain decisions by any one of the three are not always possible until one or the other has done its job. IHS must wait for site identification by the BIA before it can project costs for sewer and water services, and only then can HUD review construction plans.

Since no single agency has been placed in charge of the entire operation, there is no recourse to remedy delays or bottlenecks in the operation. When the triagency agreement was first entered into in 1968, HUD promised 6,000 units a year for the period (1970–74); the BIA committed itself to providing 1,000 new or improved units and tribal groups were supposed to sponsor another 1,000 units.

An additional complication in this triagency agreement is the problem of coordinating agency budgets. IHS attempts to budget its funds as far ahead as possible. Projects to be developed, then, are sometimes decided upon for 3 year cycles. HUD and BIA, on the other hand, are subject to the annual congressional allocation process. In the past, IHS has not known until very late where HUD and IHAs intended to place units—not only the exact site on the reservation but also which reservation—so that funds for the necessary sanitary facilities could be made available to the appropriate IHS director. The new interdepartmental agreement of February 6, 1976, attempts to smooth out the wrinkles in this procedure by stating that "if" and "when" the funds are made available by Congress, what projects shall be given priority. In at least one housing development program the problem of triagency coordination has been successfully alleviated by tribal utilization of an integrated grant under the Joint Funding Simplification Act. The Salt River Pima-Maricopa Community project in Arizona should be given serious consideration as a model for other tribal housing projects.

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[44] Remarks by former HUD Secretary, James Lynn, HUD National Indian Housing Conference, Nov. 14, 1974.

[45] Federal Register, Mar. 9, 1976, p. 10164.

[46] Leatherman, p. 38.

Third, another stumbling block to the delivery of housing has been the lack of commitment and unity among HUD officials. Most HUD officials treated Indian housing simply as another responsibility to a minority group, not requiring a special organization or programs.

In a March 19, 1976 meeting with several prominent Indian leaders. Secretary Hills restated HUD's commitment to a production goal of 9,723 units for FY 1976 and created the new Office of Indian Programs and Policy. One hopes that this new sense of commitment will be maintained by the new administration.

The only other significant Indian housing program, the BIA Housing Improvement Program (HIP) is considered a successful program. However, its relatively low budget, $11 million currently, does not permit it to make a very large impact. Former BIA Commissioner Thompson, in a hearing on Indian housing before the Senate Subcommittee on Indian Affairs in May 1976 stated that housing was not a priority item with the BIA. He estimated $1.2 billion would be needed as of FY 1975 to satisfy the housing need. This sum exceeds the BIA total annual budget. Faced with the enormity of the task, the inference was left that it was not desirable for the BIA to increase the HIP budget at the expense of other BIA programs.[47]

Fourth, there are a number of legal problems which impede delivery. For example, private investors are not willing to loan money for housing on trust land, where a mortgage is of no collateral value because the property cannot be foreclosed. Tribal courts have given too little aid to the IHAs in the enforcement or interpretation of construction contracts as well as tenant agreements.

Fifth, there is a definite lack of agreement among agencies and tribal organizations as to the goal of a housing program. The agencies view it as merely providing shelter, whereas the tribes view it as a means to promote economic development. The economic consequences of housing and related construction in terms of employment, business for contractors and material suppliers, and other related activities cannot be overlooked. There are precious few job oppoortunities existing on most reservations, and it is not uncommon for unemployment to exceed 50 percent during winter months.

Realizing the potential of housing construction in alleviating this problem by providing employment and skill development, Indian construction firms were formed and were allowed to contract directly with

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[47] Indian Housing, pp. 3–12.

IHAs. In the spirit of Indian preference, HUD originally waived its usual advertising for bids rule. However, under the new regulations published for comment by HUD on September 15, 1975, there were no provisions for negotiated contracts. Since the provisions require advertising for prospective construction bids, and since the low responsive bidder must be awarded the contract, the Indian preference has disappeared.

Sixth, the slow pace in meeting the need for Indian housing is not entirely due to forces on the national level; local political problems contribute to delays. At the center of these troubles is the relationship between the tribal council and the IHA. Reversals in tribal elections have caused wholesale purges of IHA commissioners and staff. Because knowledgeable, trained IHA commissioners and staff cannot be easily replaced, public housing programs have often been brought to a standstill when these wholesale removals have taken place. The losers in these situations are the tenants, both actual and prospective. Almost all patronage flows from the faction in power and reaches even the selection of tenants as well as those who will be employed in the construction. While such personnel turnover is not unique to Indian people, measures should be taken to discourage its practice.

Seventh, rent delinquencies are first an economic problem and second, political and legal problems for the IHAs. HUD housing is not a grant program and the legislation has always required some rent payment from tenants. A rental program in a tribal context poses several problems. First, the payment of rent, however small, requires some income. It is believed that the bulk of tenants delinquent in rent are *very* low income people, who are most in need of housing and have the least ability to obtain it elsewhere. IHAs in undertaking the housing of very low income persons in rental units run the real risk of imperiling the operation of its entire housing program. Because of delinquent rent payments and because of inadequate subsidies from HUD, IHAs have sometimes borrowed from a development account to meet an emergency, for instance to pay for utilities. The impending insolvency of IHAs will seriously affect the delivery of Indian housing.

RESOLVING THE DILEMMA

The above seven problems will only be solved by a housing program which incorporates the following five essential characteristics.

1. *Simplicity of Implementation and Operation.*—Lengthy development periods, complicated financial arrangements, and mass production techniques with scheduling problems must be eliminated in order to speed up the delivery of housing.
2. *Coordinated Cross-Agency Involvement.*—Coordination of the joint agency program by one agency would help to eliminate delays.
3. *Promotion of Tribal Control.*—Federal agencies must delegate more decisionmaking power to local tribal authorities in order to promote self-determination and to ensure that housing attains its maximum economic impact. Tribes should be assisted in developing proposals for integrated grants under the Joint Funding Simplification Act.
4. *Variety of Programs.*—There must be a variety of programs with flexibility of standards and regulations to deal with climatic and cultural differences among Indian people.

5. *Combination Grant and Loan Approach.*—Indian housing must be financed by a combination approach. Grants must be provided for housing for the very poor. Loans must be provided for the construction of low rent and middle income houses. A combined approach is equitable and will also provide more funds than a system purely dependent on grants.

OTHER CONSIDERATIONS

Before outlining the Commission recommendations, it should be mentioned that HUD has hundreds of millions of dollars in outstanding project notes and bonds which must be refinanced on an annual basis. If these securities were unequivocally "double tax exempt", free from both Federal and State income taxes, their marketability would be enhanced.

One other issue should be addressed. What should be the coverage of new legislation in terms of providing some form of housing assistance to Indians living off the reservation, even in urban areas? One possibility is that a tribe could develop a housing program that could aid a tribal member living hundreds of miles away, through a guaranteed or insured loan.

RECOMMENDATIONS

The Commission recommends that:

Congress delegate to the Office of Indian Housing the power to modify existing Federal property standards and prototype costs. The Office also institute programs geared to different income levels. Last, the Office provide housing both on the reservation and off the reservation, wherever Indian people are organized in distinct groups, whether they are federally recognized or not.

Congress make HUD housing notes and bonds double tax exempt, that is, free from Federal and State taxes.

WATER, SEWER AND SANITATION FACILITIES

The lack of sanitation facilities on Indian reservations is a primary cause of many Indian diseases. Over 40,000 existing housing units and another 62,000 planned replacement and renovated housing units need new or upgraded water and sanitation facilities.[48]

In a survey conducted by the Commission's Health Task Force of 21 tribal councils in 10 reservation States,[49] over half the respondents said there was evidence that their water systems were contaminated. Slightly less than half said their water supply was poor. Eighteen revealed that water was still being hauled from a lake or stream. All of the respondents indicated that individual septic tanks are the predominant waste disposal system. Eleven have some kind of community water system; seven said that open drainage of untreated sewage is a problem. Only eight out of the 21 reservations surveyed were receiving trash removal services, only two street maintenance, and only four drainage services.

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[48] S. 2938, 93d Cong., 2d sess., sec. 2(f)(6).
[49] AIPRC Health Task Force Tribal Council questionnaire, June, 1976.

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IHS is the Federal agency responsible for construction of sanitation facilities,[50] but must give priority to facilities for new housing, at the expense of renovation on existing ones. The Service's ability to meet the total need is further hampered by its obligation to schedule work in conjunction with HUD's housing and BIA's road construction plans. IHS cannot determine sanitation costs until HUD determines the exact location of its housing sites, and both agencies must wait while BIA decides when and where it will place streets and sidewalks.[51]

Although the three agencies signed an agreement[52] to coordinate work plans and budget proposals, it appears that no followup has taken place and that relevant input from Indian tribes has not been sought out. Coordination may be impossible, since the three agencies operate on different budget cycles.

Maintenance of all facilities, whether new or rehabilitated, is the responsibility of the tribes, who are to receive IHS training for this purpose.[53] Tribal councils report, however, that such training is inadequate and infrequent, and that there is confusion over responsibility in its actual execution.[54] Meanwhile, large numbers of householders go without sanitation facilities; deterioration sets in on facilities which stand unrepaired; and disease is spread further.

TRANSPORTATION AND ACCESS TO HEALTH CARE

In many parts of the United States, Indians live in remote areas where there are no roads, or poorly maintained roads, and no public transportation. Many tribal communities do not own an ambulance for emergency service. Harsh, climatic conditions are an aggravating factor in some places. It is, therefore, often a hardship for Indians to get to an IHS medical facility.[55] At the same time, it is uneconomical in terms of the Service's limited staff to send drivers to remote, often inaccessible areas.

Most often, it is the community health representative (CHR) who provides the transportation Indians need in order to obtain medical care. The CHR's function is to educate the community in preventive health, hygiene, nutrition, and first aid in the home, and to be the outreach, paraprofessional link between patient and professional. In actual practice, much of their time is spent in chauffering sick patients. CHR's therefore are left with very little time in which to perform the educational, technical work assigned to them. Already underpaid, CHR's also say that they spend from $100 to $200 a year out of their own pockets for patient-chauffering. Nor are they provided with liability insurance on their cars.

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[50] Indian Sanitation Facilities and Services Act, P.L. 86–12, 1950, 42 U.S.C. 2004.

[51] The AIPRC Health Task Force survey of tribal councils revealed that sanitation installation by IHS took place anywhere from before a house was finished to 3½ years.

[52] "Interdepartment Agreement on Indian Housing", Washington, D.C., U.S. Government Printing Office, Federal Register, Mar. 9, 1976, p. 10165.

[53] Indian Sanitation Facilities and Services Act, Public Law 86–121, 1959, 42 U.S.C. 2004.

[54] Of 21 responses to the AIPRC Health Task Force survey, eight felt maintenance was the tribe's job; eight said it was the individual householder's; and five said it was up to IHS.

[55] AIPRC Health Task Force hearing transcripts on this subject are Aberdeen, vol. II p. 175; Billings, p. 12; Oklahoma, p. 291; Phoenix, vol. II, p. 66; Portland, p. 14

INDIAN NUTRITION

Indians have experienced nutritional problems from the time of relocation onward. Most reservation Indians are poor to start with and the fact that most reservations have only one "trading post" store leased by the Federal Government to private parties results in very high uncompetitive food prices. Lack of refrigeration and adequate water supply compounds the problem.

The USDA's commodity program has been used on many reservations but few commodity warehouses servicing Indian country fully stock all 22 items on the commodity program's list. The lack of available commodities and the lack of proper storage and cooking facilities in many reservation homes has resulted in malnutrition being widespread among American Indians. Also, Indians on rural, sparsley populated reservations do not have the ability to travel long distances to the commodity pickup centers.

For all of these reasons, the commodity program has been generally unsuccessful, and in recent years, USDA has been gradually replacing it with a food stamp program. That program, however, has been administratively unwieldy and is especially unworkable in Indian country. The same Indian who cannot get to the commodity warehouse cannot get to the food stamp headquarters and cannot get to the retail outlet where food is sold.

Application and eligibility forms for food stamps are long, cumbersome and complicated, and many Indians have difficulty in completing them. Often they do not possess the documents necessary for eligibility. For those who cannot surmount these obstacles, there is no alternative, since USDA does not want to operate a commodity program and a stamp program simultaneously in the same community, despite Indian opinion that such flexibility is needed in order to meet diversified needs.[56]

A further complication exists for Indians who live on trust land. Because States and counties often do not understand the applicable law pertaining to Indians, they mistakenly consider trust land as an asset which precludes an otherwise eligible applicant from obtaining food stamps.

There are other drawbacks to the food stamp program. First, because food prices at an isolated trading post are higher than those at retail outlets elsewhere, a given ration of stamps does not buy as much for the Indian as it does for a consumer in the general population. Second, even though local governments charged with administering the food stamp program receive Federal financial assistance for this purpose, these local entities often must supplement from their own budgets, operate with limited staff, and handle an overwhelming load of recordkeeping. The resentment and frustration they feel often is vented on the Indians who are obliged to deal with them.

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[56] Wyman McDonald, Superintendent of the Mescalero Indian Agency, said in a May 18, 1976, letter to the Chief of Compliance and Enforcement Division in USDA, that he found it regrettable that "no small minority group such as Indians were permitted to have any special or different kind of program outside the established order." In other words, he concluded, "Indians must be just like anyone else." Mr. McDonald also said that after observing and working with both commodity and food stamp programs, he felt that commodities were more beneficial for more Indian people.

At present, USDA is phasing out the commodity program and intends to implement the use of stamps "nationally", except where it proves "impossible or impracticable". This is exactly the situation in many Indian areas, where applicants encounter a series of barriers much like those they have always faced in attempting to avail themselves of Federal social services.

Education in nutrition has been the missing link in every food program the Government has offered to Indians. Lewis Meriam, in his 1928 report,[57] strongly recommended instruction in nutrition on a comprehensive scale for all Indians and for all non-Indian staff working in Indian service facilities. Panel members at the 1969 White House conference on food, nutrition, and health repeated that view. Indians themselves have repeatedly said that they need and want to learn about nutrition. Yet, in 1974, a nutrition education bill proposed by Senator George McGovern was defeated.

THE INDIAN HEALTH CARE IMPROVEMENT ACT (PUBLIC LAW 94–437)

Public Law 94–437 is the most comprehensive Indian health legislation ever passed by Congress. The new act is designed to eliminate medical backlogs, to bring Indian health to an acceptable level, and to encourage Indian involvement in that process so that tribes can gradually assume control of health care.

In its coming effort to improve Indian Health, IHS will have the advantage of Public Law 94–437 funds, plus a guarantee (in that act) that these appropriations will in no way offset other Indian health appropriations to meet present or future needs.

Instead of the original Senate version of the bill which authorized an appropriation of $1.6 billion over a 7-year period, IHS will be working with a $475 million appropriation over a 3-year period. This difference of $70 million annually will be a significant disadvantage. Opposition from HEW (IHS' parent body) may also prove to be a serious obstacle to implementation of the Act. Funding will not start until fiscal 1978, however, and will end with fiscal 1980.

There are certain other shortcomings in the Health Act, which, if not amended, will surely slow down the transition period.

The Act, for example, provides for construction of needed facilities and their staffing, but fails to address the chronic problem IHS has in recruiting personnel.

The Act provides a total of $207,084 for facilities-construction over a 3-year period. It also funds positions and money for staff housing,[58] and for direct and indirect maintenance and repair of facilities.[59] Further, the Act authorizes funds to bring IHS facilities to compliance with requirements of the Social Security Act, so that they are eligible for medicare and medicaid reimbursement.[60]

Construction and renovation of water, sewer, and sanitation systems for existing Indian homes are also authorized in the Act.[61] For new homes, however, "such sums as may be necessary" will be appropriated.[62] After 1980, it will be harder for extensive sanitation systems to be constructed for either type of home without new legislation.

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[57] "The Problem of Indian Administration," Baltimore, Md.: The Johns Hopkins Press, 1928.

[58] Title III, sec. 301 (b) (1) (2) (3).

[59] Title II, sec. 301 (c) (b).

[60] Title IV, (b) (c).

[61] Title I, secs. 101, 102, 103, and 104.

The Act fails to take up the important question of sanitation maintenance and repair. The Indian people have indicated that this vital link to efficient facility operation has not been properly handled by IHS in the past.

Public Law 94–437 addresses IHS personnel shortages in two ways: First, by appropriating scholarship funds for health professional training;[63] and second, by appropriating position-funds[64] in categories where the service is known to have heavy backlogs: mental health, dental care, field health, and direct and contract patient care. Four hundred and twenty-five positions and $10,025,000 are authorized for fiscal 1978.

It appears that these amounts may be wholly inadequate. For example, the total identified unmet health needs of the Navajo in 1973, in four categories amounted to some $28 million.[65] Moreover, the rigidity of position-funding will not permit the kind of program flexibility called for in the individual, highly diversified service area.

The Act also authorizes the Service to employ scholarship students and any other medical students[66] during nonacademic periods of the year, and it authorizes present IHS health professionals to take leave of absence for professional consultation and refresher training courses.[67] The Act also provides appropriate funds for the construction of staff housing,[68] the shortage of which has traditionally been a factor affecting high staff turnover.

Although the Act fails to provide for current recruitment needs, the Act establishes a comprehensive recruitment program, which is sensitive to overall Indian needs and, with time, should provide IHS with adequate professionals and technicians. The Act also establishes an Indian health scholarship program for Indians and others who will serve in Indian communities.

In addition to encouraging study in non-Indian medical institutions, the Act authorizes, in title VI, a 1 year study of the feasibility of establishing an American Indian School of Medicine.

The Act does not, however, fund continuance of IHS' one school of traditional medicine at Rough Rock, nor does it provide for the establishment of additional such schools.[69]

To summarize, the Act fails to address the immediate and critical personnel shortage in IHS. No innovative recruitment program is authorized; no monetary or other incentives are offered to encourage health professionals from the private sector to enter the Service.

IHS staff has a number of peripheral problems which are not addressed in any way by the Health Act. These are: inadequate orientation in Indian language and culture; inadequate educational and recreational facilities; lack of support from other Federal agencies; a weak management system which fails to give rewards, offer career advancement potential, or establish clear responsibilities and goals. It is partially because of these problems that morale is low among IHS staff.

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[62] Ibid.
[63] Ibid.
[64] Title II, sec. 201.
[65] This amount, although considerably less than the amount proposed ($10,500,000) in HR 7852 (June 12, 1975), is in addition to NIAAA funds which will be transferred to IHS under S. 3184. That bill, passed on June 29, 1976, authorizes IHS to take over those NIAAA alcoholism treatment projects which have become "mature". At this time, it is not known exactly how IHS will use its combined NIAAA and P.L. 94–437 funds.
[66] Title I, sec. 105(a) ([illegible]).
[67] Title I, sec. 106(a).
[68] Title III, sec. 301(b)(3).
[69] Funds are, however, appropriated for the training of traditional medicine men and women in the area of mental health. Title II, sec. 201 (c) (e).

It is in the area of environmental services that the Health Act is weakest, with its focus limited to upgrading and installing water, sewer, and sanitation systems.

The Health Act fails to deal with the various shortcomings in the Service's budget and management system, which will adversely affect optimal use of Public Law 94–437's limited funding. IHS is not monitored, is accountable to no one, and allocates its budget in a rigid, fixed manner to area offices and service units without making realistic plans for meeting actual needs and reaching specific goals.[70]

Congress shows a willingness to meet the long-neglected health needs of urban Indians (who have never received substantial IHS service) in title V of the Health Act. The title's language, however, is vague, and the requirements it makes of urban Indian organizations appear excessively demanding. The precise, intended use of the title's accompanying appropriations [71] is unclear in the language of the Act.

Title IV authorizes, through a proposed amendment in the Social Security Act, medicare and medicaid reimbursement to IHS facilities. IHS is offered no guidance or funds, however, in setting up, operating, and monitoring such a reimbursement plan.

Public Law 94–437 gives but scant attention to health needs of rural, off-reservation Indians. Two pilot projects providing outreach services are authorized, at a cost not to exceed 1 percent of the amount authorized in sec. 506 for urban Indians.[72]

Maximum, yet realistic Indian involvement is encouraged throughout the Act (even to the extent that Indians be consulted as to the design for service facilities). Indian firms are given preference, under the Act, of constructing sanitation facilities and are to be paid at prevailing wage rates. Indians are also given priority for scholarship awards, and further, the Act authorizes a study on the feasibility of establishing an American Indian School of Medicine and appropriates funds for the training of traditional Indian practitioners.

Past history has shown, however, that Indian involvement is difficult to implement. The Congress has not touched upon the necessity for consistent, aggressive coordination between Indians and related Federal agencies to insure maximum Indian input and participation.

There are three health issues centering particularly on unique Indian needs—issues in which Indian involvement is crucial to success. These are mental health, drug and alcoholism treatment, and traditional medicine. Indians, not Federal agencies, can deal effectively with other Indians who are mentally ill or addicted. The Act's appropriation for training of traditional Indian practitioners in mental health, therefore, seems disproportionately low.

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[70] The National Congress of American Indians, at its Oct. 22, 1976 annual convention in Salt Lake City, declared that: "In order to assure an adequate authorization level through the life of the Act, Congress will need to be satisfied that appropriated funds are being utilized with maximum efficiency . . . A review of the past performance of IHS . . . would indicate that major changes in the management of IHS will need to be effected if the intended results of Congress are to be realized."

[71] Title V, sec. 503(a) (1) through (9).

[72] Title V, sec. 508.

The Indian will be the ultimate beneficiary of any improvements in health care accruing from Public Law 94–437. Yet, Indians, as patients, appear to have been neglected in the act. They have stated in repeated testimony that the service they now receive from IHS and alternate sources is not truly relevant to them. Non-Indian medical methods are alien, and Indians are the ones who have had to adapt, rather than vice versa. Health professionals hired by the civil service do not speak their language. Many ignore Indian values and needs. Indians feel "processed" and rushed when examined. And, they are even denied services to which they are entitled simply because a given clinic lacks doctors, or equipment, or money. Indian resistance and hostility, in turn, create morale problems in the medical staff, and the present delivery system represents frustration for everyone.

General Recommendations

The Commission recommends that:

Indian Health Service (IHS) establish a formalized mechanism through which IHS officials can work closely with Indian people toward the successful implementation of Public Law 94–437.

Congress appropriate sufficient funds for the continuance of present Indian centers in urban areas which asist Indians in obtaining medical and other social services; and should encourage, with funds and guidance, the establishment of additional such centers in all urban areas where Indians live.

Congress create in the Office of Civil Rights (OCR) a monitoring and enforcing division targeted at discriminatory urban health providers.

IHS receive supplemental fundings for providing outreach medical care to isolated, rural Indians.

Congress hold oversight hearings regarding the implementation by IHS of the Indian Self-Determination and Educational Assistance Act (Public Law 93–638).

A. FACILITIES

The Commission recommends that:

Congress hold oversight hearings to determine Indian needs in the areas of health care facilities, construction, and maintenance and appropriate sufficient funds to meet those needs.

Congress hold oversight hearings to ascertain the success of mobile health vans at the Navajo and Rosebud Reservations and over TV satellite formerly used in Alaska; and determine whether these programs should be expanded to isolated, inaccessible areas.

B. STAFFING

The Commission recommends that:

Congress hold oversight hearings to ascertain the problems regarding the high turnover in personnel at IHS and act to remedy these problems.

Congress create a medical para-professional corps to be used on Indian reservations, particularly in the areas of alcoholism and mental health.

IHS be funded to allow the expansion of present training programs so that they are located in individual service units and geared to specific staff shortages in those units.

Congress appropriate funds for on-going orientation programs to educate IHS employees in Indian culture, and to provide for Indian interpreters in all service units.

C. BUDGET AND MANAGEMENT

The Commission recommends that:

Congress request the General Accounting Office to conduct a management study of the Indian Health Service and periodically to audit all IHS services.

The executive branch direct all Federal agencies to report to Congress on problems regarding the coordination of budget cycles and, if necessary, request legislative reform.

D. HOUSING

The Commission recommends that:

Congress reorganize the Indian housing program and give one agency the primary responsibility for coordinating and administering the program. Upon establishment of a new independent consolidated Indian agency, as recommended in chapter VI of this report, all Indian housing programs should be transferred to that agency.

E. TRANSPORTATION

The Commission recommends that:

Congress direct IHS to report on tribal needs for fully equipped ambulances and other vehicles to transport nonemergency patients on reservations and should then appropriate necessary funds to provide such services.

F. NUTRITION

The Commission recommends that:

The Department of Agriculture review and revamp its food supply system to insure consistent delivery of nutritious, health-giving goods to the Indian people, with particular emphasis on high-risk groups such as infants, children, pregnant women, the elderly, and the handicapped; and, to insure the simultaneous use of both food stamps and donated foods for those tribes desiring it.

BIA replace the monopolistic trading post, with its high prices and inferior stock, with as many efficiently managed food stores as are needed for accessibility by Indian people wherever they live on the reservation. These stores should be under Indian management.

The executive branch upgrade tribal programs for education in the areas of hygiene and nutrition.

G. ALCOHOLISM AND DRUG ABUSE

The Commission recommends that:

IHS upgrade the demonstration projects heretofore administered by National Institute on Alcoholism and Alcohol Abuse.

EDUCATION

INTRODUCTION

Education for Indian children has been, traditionally, a family-tribal function where they are taught by the community those skills and values needed to function within the child's particular tribe. Formalized, classroom education with textbooks, teachers and schoolhouses was imposed on Indian youth by non-Indians in an attempt to assimilate them into the dominant culture.

The Federal provision of education for Indians is a treaty right of many tribes, and clearly a service component of the trust-relationship. Education has been consistently used as a tool of Federal policy to implement the Federal Government's vacillating plans for the fate of the Indian people. Today, both Federal and Indian educational priorities are aimed at self-determination. Basic questions must be asked about the effectiveness of the Federal effort when school systems do not reflect that policy.

The primary agencies controlling Indian education are:

1. The Office of Education under HEW which administers the Federal Impact Laws Public Law 81-874 and Public Law 81-815, and the Elementary and Secondary Education Act titles I, II, III, and IV;
2. The BIA which administers assistance through provision of Johnson-O'Malley funds, directs school operations for BIA schools, and supports career development programs;
3. State departments of education which are not only obligated to educate Indian children as citizens of the State in their public schools, but also are the recipients of Federal funds targeted for the specific education of Indian children;
4. And school boards which manage, on the local level, funds designated for each school.

The newest, and paradoxically the oldest, participant in Indian education is the tribal community. It is clear that the return of control of Indian education to the Indians is an overriding priority. The manner in which this is carried out should be decided by the tribal governments so that tribes may insure their continued control.

BACKGROUND

Indian education has been the focus of much concern. Although legislation has been passed to alleviate some of the problems in Indian education, many remain unresolved:

A. The Indian populaton is substantially less educated than the non-Indian population.

B. The education provided for the Indian population is often irrelevant to both its needs and culture.

C. Indians educated in public schools often fall 2 to 3 years behind their non-Indian counterparts in achievement levels.

D. The educational bureaucracies often expend the majority of their efforts seeking funding rather than developing relevant educational programs for Indians.

E. Most important—the majority of Indian people have no mechanism for input in the education of their children.

In order to understand where Indian education stands today, it is necessary to trace the policies underlying Indian education and the historical events that have shaped the current situation.

HISTORICAL

The first non-Indian efforts to "educate" Indian children were made by missionaries in early colonial times. Their attempts to assimilate Indian people centered on Christianization. This movement eventually led to the establishment of manual-labor boarding schools that removed Indian children from the influences of their communities and tribal ways of life. The next stage was the development of Federal schools on and off the reservation. In this century integration into the public school system was established to insure assimilation.

Early scattered missionary and humanitarian workers in the late 17th and 18th centuries sought to teach Indians the rudiments of "civilization", and the result of this concerted effort was the establishment of more than 15 schools. Educational efforts occurred at the level of higher education as well, as evidenced by early programs at Dartmouth, Harvard, and William and Mary.

The early part of the 19th century saw a number of Federal actions regarding education. Treaties made during this period and later frequently provided for educational services to the tribes. Promises were made for general education purposes, teachers' salaries, construction and maintenance of school buildings, support of manual labor and industrial schools, instruction in agricultural, mechanical and industrial arts, school supplies and materials and general funds for education. The Trade and Intercourse Act of 1802 endorsed and provided funds for these objectives.

In 1818, Congress created the Civilization Fund. The objectives of this Act was to provide funds for the civilization of all Indians, rather than dealing with individual tribes through treaties. This was intended to incorporate Indians into the mainstream of society.

The Civilization Fund was the impetus for many investigations into the conditions of Indians. In 1822, Jedidiah Morse, a minister, made an inspection of the tribes to ascertain their general condition and progress in education. He reported that "education families" (usually associated with religious denominations or missions) were to be, "the great instruments in the hands of the government for educating and civilizing Indians." [73] Within a year, these schools were operating "successfully", i.e., teaching Indian children how to survive in a 19th-century capitalistic society.

At the time these manual-labor schools were being organized, the Five Civilized Tribes were removing their children from State-run schools and bringing them back to tribally financed operations. By 1849, this system was one of the few exceptions to the missionary-run school.

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[73] Jedidiah Morse "A Report to the Secretary of War of the U.S. on Indian Affairs", New York; A. M. Kelly 1970, p. 79.

The year 1851 saw the initiation of the reservation settlement period. For the next 20 years, reservation settlement of Indian tribes was enforced. The overriding concern of the Federal Government at the end of the Civil War was to "clean up" the Indian Bureau and to bring remaining hostile Indians onto reservations. The new President, Ulysses S. Grant, used the churches to take up civilizing and educating Indians. In 1869 President Grant initiated a Board of Indian Commissioners "to cooperate as an inspecting and advisory body." [74] These Board members took the responsibility of hiring Indian agents of "Christian character" who represented various denominations.

At the same time treaty making ended in 1871, the Board of Indian Commissioners called for more precise policy on the operation of schools for Indians. The Commissioner of Indian Affairs also noted in 1885 that removal from place to place had prevented Indians from acquiring settled habits or a taste for civilized pursuits.[75]

In 1870, an appropriations bill was passed "for support of industrial and other schools among Indian tribes not otherwise provided for." This Act brought Indian education more directly under the control of the Indian agent and stimulated the establishment of government schools. These schools were designed to direct Indian children toward the white community. Indian culture, religious values, and tribal environment were undercut by agents and churches at the tribal level.

After the reservations were under the control of the Indian Bureau, certain Members of Congress and the Board of Indian Commissioners began advocating a more "humanitarian civilizing policy" toward Indians, which ironically led to the allotment era.[76]

This period of allotment separated clans, defied tribal authority, and arbitrarily identified Indians and saw the major growth of off-reservation boarding schools.

Colonel Pratt, Director of Carlisle Indian School (the classic example of an Indian boarding school), believed older Indians were beyond hope. However, if young Indians were separated from their culture and the influences of their tribe, they would become functioning Americans.

Although the early allotment period saw the expansion of the Federal school system in institutions like Carlisle, the programs did not appear, by 1901, to be having the desired impact on the Indian people. Commissioner W. A. Jones called for a shift from nonreservation boarding schools to on-reservation boarding and day schools. This attitude was also supported by the next Commissioner, Frances Luepp, who campaigned to construct schools to "carry civilization to Indians . . . (not) the Indian to civilization." [77]

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[74] "Annual Report of the Commissioner of Indian Affairs for the Year 1879", *supra*, note 25, pp. 4–5.

[75] Ibid.

[76] *Hearings before the Committee on Indian Affairs*, House of Representatives, 73d Cong., 2d sess., on H.R. 7702, Washington, GPO, 1934.

[77] "Annual Report of the Commissioner on Indian Affairs for the Year 1907," p. 21–30.

The next major change in educational policy came in 1910 when there was a shift of emphasis to public education. Contracts were made with public school districts for the public education of Indians. The BIA also mandated the adoption of public school curricula in the Government schools. By 1912, the number of Indian children in public schools was larger than in Government schools.

Further encouragement to place Indian children in public schools came with the 1924 Act declaring all Indians citizens. States were encouraged to treat Indians equally with other citizens and encouraged Indian people to accept the same duties and responsibilities as other citizens, including public education for their children.

The same year, a "Committee of One Hundred Citizens" was called together by the Secretary of the Interior to discuss ways to improve the Indian Service. The BIA acknowledged but did not act upon the committee's recommendations.

"The Problem of Indian Administration" (The Meriam Report), issued in 1928 pointed out the shocking conditions in the boarding schools. The report called for an end to the enrollment of elementary school children in boarding schools and an increase in the number of day schools. The report supported Indian cultural diversity and advocated the use of education as a tool to reinforce this.

When W. Carson Ryan, education specialist of the Meriam Report, became Director of Indian Education for the BIA, he sought to develop a more responsible education program. Ryan's efforts included: organizing a community school system on the reservations, increasing Federal-State education contracts for Indian children attending public schools, phasing out boarding schools; and extensively revising the curriculum. The curriculum was to be organized to teach basic skills and incorporate cultural traditions and art.

This attitude carried into the decade of the 1930's when Commissioner Collier sought to improve existing schools and develop day schools that would work with adults as well as children and thus become community centers.

The Johnson-O'Malley Act was passed in 1934, giving the BIA power to contract with States for special education services. This law permitted a single contract with the States rather than the hundreds of contracts with local school districts which had been necessary. As well as contracting powers, the States were recipients of Federal dollars to operate these services for the benefit of Indians. A condition in the California contract has a particularly pertinent statement "(The State of California) agrees to afford special courses in Indian arts and crafts, to provide an educational program designed to meet the special needs of the Indians . . . to the end that the program shall take adequately into account the Indian community life, shall be based on Indian economic, health and social needs, and shall encourage Indians' participation." The formalized pattern of Federal-State activity in Indian education established by Johnson-O'Malley continues today.

The Wheeler-Howard Act of 1934 (the Indian Reorganization Act) formalized the Government's policy of supporting undergraduate and graduate education for Indians. It extended Govenment assistance in the form of loans to Indians who wished to attend nongovernmental vocational, trade, and high schools as well as colleges and universities.

This period of support for Indian tribes, their education, their culture and their economics ended after World War II under the belief that Indians were prepared for equal participation in American life. The Hoover Task Force on Reorganizing the Executive Branch recommended in 1949 that the "Federal Government relinquish its responsibility over Indians to the States." This trend resulted in the Federal policy of termination, formalized by Congress in 1953 in H. Con. Res. 108. This affected Indian education by shifting the responsibility from the Federal Government to the States.

In the 1960's, increased emphasis on self-determination brought attention to the need for widespread reform in Indian education. The report of the Special Subcommittee on Indian Education (Kennedy report)[78] resulted in passage of the Indian Education Act, Public Law 93-218. It provided formula grants for special Indian education programs by adding a new title III to Public Law 81-874. The law also stressed community control and self-determination.

Congress recognized in Public Law 93-638 (1975) the need for Indian self-government and the concept that Indian self-government depends upon Indian control of Indian education, when it passed Public Law 93-638, title II in 1975. Known as the Indian Self-Determination Assistance Act, the new law reformed the Johnson-O'Malley Act of 1934 by providing a new design for Indian education contracting.

The implications of this new legislation are beginning to be felt by the tribes. To date, BIA provides contracts for 25 schools and the Office of Education funds 26 schools through title IV, part A, of the Act.

"The rapid growth of the movement toward Indian schools itself indicates the readiness on the part of many Indian communities to accept the inherent responsibility in spite of the bureaucratic drawbacks."[79]

BIA AND EDUCATION

The Bureau of Indian Affairs operates a school system that supports 213 elementary and secondary schools, 77 of which are boarding schools; 3 postsecondary institutions; 19 dormitories for Indians attending public schools; and adult education programs. The BIA spent $243,590,000 on education in 1976. BIA schools and programs are attended by 50,000 of the total 200,000 Indian children attending school. Approximately 9,000 school-age children are unable to attend school due to lack of facilities. BIA also administers $27 million in Johnson-O'Malley funds earmarked to supplement programs for Indian students in public schools.

The BIA's major educational activities include: directing BIA school operations and assisting public schools through provision of Johnson-O'Malley funds and career development activities.

The Office of Education has 2 organizational divisions: (1) the Washington, D.C., staff works as a liaison; (2) the Indian Education Resources Center in Albuquerque provides assistance.

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[78] Indian Education: A National Tragedy—A National Challenge.

[79] Dr. Myron Jones, "Non-LEA Controlled Schools" a position paper, Jan. 1977.

The structure of the BIA's Office of Education does not allow adequate input from local people. The BIA's Office of Education is poorly structured. Because of the centralization of decisionmaking processes, decisions are made without adequate local input. For example, it is the Commissioner of Indian Affairs rather than the Education Director who is responsible for directing support into critical areas.

Some effort has been made to correct this problem. In 1972 a "redirection of BIA programs" was announced. A 5-point plan was designed to assist Indians "toward self-determination through economic, educational, and social development on reservations." [80]

The intent of this program was to "become truly responsive to the needs of Indian children and parents. Control should be in the hands of the Indian communities. We hope to have at least half of all BIA schools under Indian directors by 1976." [81] Although no policy directives were stated in the BIA manual, a number of memoranda on Indian contract schools were issued by the Director's office.

Six contract schools were created during Commissioner Bruce's administration over the objections of the area directors. Congressional oversight action was necessary to force movement on the part of BIA. In spite of the President's and Commissioner's support of Indian-controlled schools, there was no operational policy toward this end. As a result, there are now only 25 schools under contract, 8 of which were formerly BIA schools and 17 previously private, but not run through a tribe or tribal organization.

Initially the Johnson-O'Malley Act was designed to assist local public schools in paying the costs of educating nonreservation Indian students. This money was provided, in lieu of taxes, to assist in paying the basic support costs of school operation. As time passed, greater numbers of reservation Indians began to attend public schools. Congress, seeing a need to provide special educational services to these Indian students amended the Johnson-O'Malley program. The present Johnson-O'Malley law calls for a slow phase-out of all basic support programs, so that in a short period of time, Johnson-O'Malley will solely be providing monetary support to special Indian educational programs.

During the 1970's, Johnson-O'Malley appropriations increased from $7 million to $27 million a year. In fiscal 1976, Johnson-O'Malley funds supported programs for 115,000 Indian reservation students taking part in basic skills programs, remedial work, specialized reading, and cultural enrichment. These funds also included funds for parental involvement, parental costs for students, and home-school coordination.

In recent years there has been debate on whether to use Johnson-O'Malley funds for basic operating moneys or for supplementary education programs. Congress amended Johnson-O'Malley in 1975 to permit contracting of educational services by tribes and Indian organizations, and to permit continued contracting by States. Today, pressure from tribes and organizations has redirected Johnson-O'Malley programs to supplemental services rather than basic education. Several evaluations by private organizations have shown a need for closer monitoring of Johnson-O'Malley funds. Despite legislative controls, Federal moneys are still being used to replace basic funding. Instead of finding new supplemental approaches to Indian education, most schools reinforce their basic program approach and the Federal programs become remedial.

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[80] Louis R. Bruce, The Bureau of Indian Affairs, 1972, p. 243.

[81] Louis R. Bruce, The Bureau of Indian Affairs, 1972, p. 247.

Many educational policies announced in Washington have not reached the people for whom they were intended. Many critical areas of education have not been evaluated through examination of tribal and community needs. And there has been little effort to organize a policy based on Indian involvement in meeting educational goals.

THE OFF-RESERVATION BOARDING SCHOOL

The boarding school has been the primary educational tool of BIA for the last 100 years. There are now some 17,333 elementary school children and about 9,431 high school students enrolled in Federal boarding schools. Of these, 19,988 attend schools on reservations and 6,776 attend off-reservation boarding schools.[82]

In 1969 the Special Senate Subcommittee on Indian Education called Indian education a "National Tragedy and National Challenge" (the Kennedy report). An area that the report studied closely was the Federal boarding school. It said that in 1969:

> More than 1,200 Indian children attended school in 29 off-reservation boarding schools. (They) are frequently transported hundreds of miles, far away from family life, tribal value, standards, and customs, a vast majority of them are labeled by their teachers as misfits, underachievers, or troublemakers and attitudes of school personnel insure that they will never be considered otherwise while in school.

The report described the Bureau of Indian Affairs' off-reservation boarding school programs as follows:

> One is the regular school, which provides the students in residence there with a course of study leading to a high school diploma. The other provides dormitory facilities for students participating in the border town program, in which students live at BIA dormitory facilities and attend nearby public schools. Frequently, the two programs are operated concurrently in the same facility.[83]

Students are referred to off-reservation boarding schools by local reservation social workers and superintendents. At the time the Kennedy report was made, the education and social criteria outlined for boarding school students clearly indicated that they had special behavioral and language problems.

The Kennedy report identified other recurring problems in the off-reservation boarding school system. There is confusion over how individual schools fit into the overall goals of BIA. While administrators know the composition and problems of their student body, they feel helpless in dealing with those problems. The boarding school curriculum is not responsive to student needs, nor does it meet the most basic standards for a meaningful education. Teachers and guidance personnel are often "old line" bureaucrats who have been with the Federal school system for a number of years.[84]

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[82] Educational statistics supplied by Toni Pierce, Education Division, BIA. (Subject to change), August 1976.

[83] United States Senate, "Compendium of Federal Boarding School Evaluations", 1969, p. 253.

[84] *Ibid.*, pp. 257–258.

After the Kennedy report, various visiting committees appointed by area directors and approved by the Commissioner of Indian Affairs evaluated programs, administrators, teachers, facilities, and other aspects of boarding school life. They visited 15 schools from 1971 to 1974 and found shortcomings in every school, except the Concho Elementary School.

The Education Office of BIA conducted a similar survey in 1975. It supported the findings of the visiting committees and Kennedy report. Specifically, it said that the majority of students surveyed were recommended on the basis of educational and social criteria outlined in the BIA manual.[85] At secondary boarding schools, surveyors heard that "entering students have average or above average intellectual ability, but range from 1 to 3 years behind the level of basic skills involved in math and language.[86]

The survey revealed some progress. Elementary schools had organized programs to respond to students with special learning difficulties. Funds from the Elementary and Secondary Education Act have been used to add basic skills, specialists, cultural enrichment, counseling, and guidance efforts for students.

The survey offered a series of recommendations, including the following:

Policy.—Establish clear missions and goals for the schools based on the needs of students. Organize an admittance and transfer policy for students in each level of school: elementary; secondary; and postsecondary.

Personnel.—Area offices should maintain civil service registers of potential employees to permit more efficient filling of vacancies. Hire sufficient diagnostic staff at each school to meet student needs. Each institution should have a program development and evaluation specialist.

Finance.—Establish a method for equitable funding. Standardize accounting procedures and fiscal reports.

Student Services.—Devise and maintain a uniform system of student enrollment and withdrawal records.

The various reports, along with research by the Review Commission's Education Task Force show that little progress has been made in boarding school education in the 7 years since the Kennedy report. None of the Kennedy report's recommendations have been adopted. In that time, there has been student unrest in practically every off-reservation boarding school. A number of lawsuits have been brought against the Bureau by the National Indian Youth Council and several Indian parents. The unrest and lawsuits indicate strongly that students are dissatisfied with the education. Yet many Indians fear that change in the boarding school means that the schools will be taken away completely rather than improved.

The area of boarding school policy has been neglected by both the executive and legislative branches of government and avoided by BIA. Even the Bureau's policy of "closest to home" education for Indian children has been overlooked according to the Bureau's own statistics.

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[85] BIA manual, 62 IAM 2.5.2. (A, B).

[86] George Underwood, "Off Reservation Boarding School Survey", Apr. 1976, p. 8.

It is necessary to reassess boarding schools and their objectives. What is the purpose of a boarding school? What is the makeup of its student body? Can the boarding school facilities be better utilized to serve the student? Is there a better alternative?

UNITED STATES OFFICE OF EDUCATION

Another Federal educational agency affecting Indians is the United States Office of Education. This agency provides funding for the education of 140,000 Indian students, 100,000 of whom are in public schools. This support comes from a number of legislative authorities and is for the most part administered by the U.S. Office of Education through State school systems to local school districts. The Office also funds a number of Federal programs with direct grants to local school districts, bypassing State departments of education.

USOE programs fall into 3 categories: (1) those designed to solve critical education problems, all of which are intended to be available to Indian students; (2) those designed to meet the needs of Indian students only, under Johnson-O'Malley and title IV, part A of the Indian Education Act; and (3) those designed to compensate schools for the education of nontaxable students. (Public Law 81-874 and Public Law 81-815). Federal money for the first two types of programs cannot supplant other sources of funds and receipt of the money requires special program development.[87]

While USOE involvement in Indian education is fairly recent, important legislation in the last two decades had strengthened its role. That legislation includes:

1. In 1953, the amendment to the Federal Impact Laws (Public Law 81-874, Maintenance and Operations, and Public Law 81-815, School Construction), making schools with Indian children eligible for impact aid dollars.
2. In 1965, the Elementary and Secondary Education Act:

   Title I: Financial assistance to meet the special education needs of educationally deprived children.

   Title II: Financial assistance to carry out new and imaginative elementary and secondary programs designed to meet the special educational needs of children of limited English-speaking ability.
3. In 1972, the Indian Education Act:

   Title IV: Created the Office of Indian Education within USOE and thus defined USOE's responsibility to serve Indians as Indians rather than members of a broadly defined target population.
4. In 1974, Public Law 93-280, the top priority funding for Indians revised the entitlement and payment structure of Public Law 81-874 to include 10-15,000 more Indian students under impact aid funding; thus providing an additional $2 million Federal aid to the schools they attend.

USOE administers and manages 110 education programs which provide a wide range of services to the general public. As United States and State citizens, Indians may in theory apply for any USOE service for which they meet eligibility requirements. In practice, however, Indians participate in or receive benefits from less than 40 percent of the programs and only 2.3 percent of the USOE budget is spent on services to Indians. Given the critical needs in Indian education, this low percentage figure seems incongruous.

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[87] Dr. Myron Jones, position paper, "Special Programs vs. Basic Programs in Local Education Agencies", Jan., 1977.

Each USOE program has an administration and management structure of its own that has been defined by its many enabling laws and USOE administrative policy. Nevertheless, many program objectives overlap. While programs share objectives, they differ in the form of services provided. When these services are categorized, it becomes evident that only a portion of those funds benefiting Indian people are spent for direct instructional services.[38]

The problem that dominates the administration of USOE services to Indians is the lack of an adequate management information system to handle the collection and storage of data on Indians. Without it, much information has to be based on estimates.[39]

Data discrepancies and questionable accounting methods inflate the amount which USOE actually spends on Indian education. A second question is why the USOE money that does reach Indians has not had a greater impact.

Frequently USOE programs are aimed at broad groups, such as the "disadvantaged", and only serve Indians as a segment of that group. Such programs ignore the Indians cultural and linguistic background. Many programs are limited by specific legislative language defining the strategies for implementing programs: Administrators often adopt this language as funding guidelines and leave little discretion in the program for people at the local level. More general language would permit individualization of services to meet the needs of program recipients.

Local educational agencies can also delay funding. If legislation creates programs through State grants, the allocation of funds to local education agencies or services entities will be made by the State department of education. The degree to which Indian people benefit from such funds depends solely on the degree to which each State has assumed an advocacy role in Indian education.

This structure of funding general education needs through State entitlement and block grants is not suited to meeting the varying needs of the Indian community. This system assumes that after a State or local body has been able to design an educational model and assemble instructional materials through Federal funding, it will continue to fund these programs.

This often has not been the case. Many programs were allowed to go out of existence. The communities serving Indian education lack the skilled professionals in education planning and administration to manage grants. They also do not have adequate local, taxable resources to finance Federal programs. For those reasons, Federal funding is a temporary means of providing supplemental services for Indian children, but is not a solution to educational and economic problems.

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[38] *See* ch. 4, Federal Administration, section charts on USOE for further information.
[39] *See* ch. 4, Federal Administration, section on reliability of data for examples.

Often USOE services miss their targets and only reach Indians coincidentally or indirectly.[90] Stronger direct lines of communications must be established between tribes and communities on one hand and the Federal sources of fundings on the other. USOE policies and administrative structures must support and enhance the development of skills and resources on the local level to promote tribal control. And each program's enabling legislation must be amended to target direct services to Indian tribes and communities. A comprehensive legislative package is needed which insures tribal and community control and institutional delivery of Federal aid to the tribes.

THE STATE ROLE: POSITIVE OR NEGATIVE?

An examination of the States' role in Indian education reveals needs, disparities, and inequities in the system. The States generally feel no special responsibility to Indian children. As a result, Federal funds targeted for Indian children through the States often are not received or are used for basic education rather than for supplemental Indian programs. Federal funds are diminished by State administration costs and are not adequate to meet specialized State and local needs. Special provisions for teachers and administrators trained in Indian culture are almost nonexistent. Certification of individuals recognized by tribal authorities as experts in Indian culture is not allowed in most States. And there is little effort made to form Indian studies programs in schools with high Indian enrollment. As education is turned over to the States, a need remains for the Federal Government to insure adequate education of Indian children.

The States first took on a significant role in Indian education with the extension of citizenship to Indians in 1924 and the Johnson-O'Malley Act in 1934. In examining the problems and needs of Indian education at the State level, the Review Commission's Task Force on Education conducted a survey of the service delivery process.[91]

The majority of States responding [92] to the questionnaire described their role and responsibility in educating Indian children as the same as for all children, regardless of ethnic background. Most States viewed the Federal Government's role as that of a funding agency only. The States seldom identified Indian children for the purpose of receiving general education and there appeared to be no standard procedures for identifying Indian children to receive special education services.

Only seven States had statutes relating to Indian education and only three States had prepared research studies on Indians since 1969. Two States had provisions for training Indian educators, and very few had provisions for certifying Indian cultural resources persons. A number of States were training teachers in human relations, but this training was not established specifically for Indian educators. Only Nevada had any provision for training of teachers or administrators in the study of the American Indians. A majority of States saw an increasing role for Indian tribes, communities, and parents in the education of Indian children. Several States indicated that the role of Indian and other ethnic parents should not differ from that of other parents.

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[90] See footnote 16.

[91] For further information *see* sec. IV, "State Policies and Finance" Task Force V report.

[92] Many States did not respond to the questionnaire or certain questions. Thus, tabulations do not reflect input from all States contacted.

The survey showed that States would be opposed to any Federal programs that would bypass them and provide funds directly to the tribes or communities. This attitude is important to bear in mind when looking at the State role in educational policy and finance.[93]

New finance laws in some States have permitted increased spending in many poor school districts, but significant disparities still exist. Indians usually attend schools that are in poor districts, and while the expenditure per Indian pupil in public schools has risen from 1969 to 1975 the gap between this figure and the per-pupil expenditure for non-Indians remains.

The availability of State or Federal financial resources determines whether any program can meet the special education needs of Indian students. If the special needs of those Indians in public schools is unmet, the blame lies with local, State and Federal mechanisms which channel funds to school districts and to special programs for Indian students.

The Review Commission's Task Force on Education determined five significant reasons for the failure of Federal and State funds to meet the needs of Indian students in public schools. They are (1) Fiscal inequality among the States and the school districts within the States; (2) school districts with significant numbers of Indians are usually among the poorer districts and have limited local resources; (3) in most States, Indian students are widely dispersed, which hinders development of special programs to meet their needs; (4) most Federal programs with significant resources do not have provisions to assure that funds will be directed to programs for disadvantaged Indian students; and (5) Federal programs that have provided the bulk of Federal money to school districts with Indian children have declined in funding.

A study was made recently on the effectiveness of Federal funding administered by the States for Indian children. Based on a detailed analysis of school districts, the study found that the existing methods of school financing do not assure Indian children of equal per-pupil expenditure or an adequate basic education program. This lack of basic support is the reason Federal supplemental and special programs are necessary.

The study was critical of the money distribution patterns of legislation aimed at improving Indian education. When discussing impact aid, P.L. 92–874, the study noted that the Indian Education Act does not provide adequate funding for basic education needs. This Act does not take into account the extra costs associated with educating reservation Indians who often must travel great distances to school. The study was also critical of Johnson-O'Malley for the lack of equitable distribution formulas or any formulas at all. Of title IV, Indian Education Act, it found that title IV programs are used to fund activities that have other funding sources. And of title I, Elementary and Secondary Education Act, the report found that Indian children were not receiving an adequate share of funds to meet their needs and that Indian parents have little or no say in program matters.[94]

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[93] Sec. IV, "State Policies and Finance" Task Force V report.

[94] S. Smith and M. Walker, "Federal Funding of Indian Education: A Bureaucratic Enigma". Report No. 5, Legal Act on Support Project, Bureau of Social Research, Inc. (Washington, D.C., May, 1973).

Dr. Myron Jones in his position paper, "Federal Responsibility for Indian Education", suggests ways Federal pressure can be brought to bear against States not providing adequate education for Indian children. They are: (1) Lawsuits for racial discrimination where it can be proven: (2) withdrawal of categorical aid; (3) withdrawal of Public Law 81–874 funds; and (4) imposition of stricter regulations on the use of Public Law 81–874 money so that in mixed Indian and non-Indian districts, teachers, facilities, and curricula for Indians must be demonstrated to be at least as good for non-Indians.

COALITION OF INDIAN-CONTROLLED SCHOOL BOARDS

One of the fastest growing movements in Indian education is the Coalition of Indian Controlled School Boards. Organized to promote Indian control of Indian education without State or district regulation, the Coalition defines an Indian-controlled schools as:

> A school whose policy setting management is carried out through a duly-elected school board composed of Indian people from the community which the school is serving. The heart of control of a school is that the Board is managing every aspect of a school system, including the funds that a school system received.[95]

Although the Indian people consider such schools educationally successful, major problems still exist because of a lack of adequate physical facilities and funding. Despite these inadequacies, many communities are using these schools to educate and revitalize the whole community.

Testimony before the Review Commission's Task Force on Education indicated that one of their most pressing concerns was for maintenance of Indian culture, history, and language. Many witnesses suggested Indian people in teaching positions as a major step in reaching this goal. The presence of Indian elders in the school would make Indian history and culture an integral part of the school curriculum.

The movement toward Indian control is the most significant development in Indian education, but there are three major difficulties: (1) The long-range policy of assimilation and the effort to move Indians into public schools; (2) varying policy and principles toward respect and use of Indian culture; and (3) Federal rules, regulations and priorities intended to implement policy but, which in fact, restrict this policy.[96]

If these obstacles can be overcome, Indian-controlled schools will restore self-image and interest in Indian life among Indian youth. These schools are lowering the dropout rate and restoring responsibility and discipline among Indian young people. They are graduating young people who have solid basic skills and a positive self and community image.

Indian-controlled schools represent a first step towards an institution that can serve not only the young but the whole Indian community.

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[95] Unpublished hearings of Task Force No. 5, Washington, D.C., June 21, 1976, CICSB. Statement, part II, p. 1.

[96] Unpublished hearings, Washington, D.C., p. 377.

ACHIEVING TRIBAL CONTROL

Because education is clearly a jurisdictional right of the tribe, the tribe should have the right also to control educational moneys provided for Indian children by the Federal Government.

This will not be easy to accomplish. According to one observer: "Tribal involvement in education has been for the most part occasional and uncoordinated. Many title I–IV and Johnson-O'Malley programs have parent committees to provide tribal involvement in public school affairs. But these groups often find this task beyond their capability—either because of the closed position of the public school administration or because the committee members have not the time, training, or information to represent adequately their tribe's total educational needs."[97] "Tribal divisions of education have done an impressive task on some reservations in identifying and addressing educational needs on a systematic basis. On the whole, however, tribes have yet to approach the level of involvement needed to insure that their children would receive quality educations."[98]

One area of tribal concern is how extensively they should become involved with the educational process. Many believe the ideal situation is Indian control of their own schools and school systems. Many tribal leaders feel that to maintain a strong tribal government educational decisionmaking should be housed in the tribal leadership. On the other side, local school representatives and community people think the schools should be run by the people who are directly affected—the students, parents, and administrators. Other plans fall between these extremes. The important point is that the tribe has the right to decide.

Many tribes do not feel large enough or knowledgeable enough to support their own schools, but they still want to be involved. Such a tribe may decide to track and administer all Federal funds affecting Indian children. These tribes could make their own program and policy decisions about supplementary curriculum grants and work to insure that funds designated for Indian children are used to their best advantage.

Whatever the degree of involvement or method of running the schools, it is the tribes' right to decide how its children are educated.

BEYOND SECONDARY SCHOOLS

The desire of Indian students for college education far surpasses the programs available. Existing programs are promising, but meet only a small percentage of the need.

Efforts to provide advanced education to Indians date back to the 18th century. Indians who attended college in the 18th and early 19th centuries were provided with no special programs. George Washington commented on that point:

> I am fully of the opinion that this mode of education which has hitherto been pursued with respect to these young Indians who have been sent to our colleges is not such as can be productive of any good to their nations. Reason might have shown it, and experiment clearly proves it to be the case. It is per-

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[97] Dr. Myron Jones position paper, "Tribal responsibility for Indian Education".

[98] Ibid.

> **haps productive of evil. Humanity and good policy must make it the wish of every good citizen of the United States that husbandry, and consequently, civilization, should be introduced among the Indians.**

This statement set forth the assimilation philosophy that was to prevail up to the 1930's and intermittently beyond.

The Meriam Report of 1928 pointed out the need for furnishing scholarships and aid for Indian higher education. In 1934, the BIA insisted that loans for tuition and other expenses in recognized colleges be included in the Indian Reorganization Act. Regrettably, in 1952 Congress discontinued the loans. This action reflected congressional opinion that Indians should be taught to develop and suceed as citizens off the reservation.

In 1957, the Fund for the Republic established a Commission on Rights, Liberties and Responsibilities of the American Indians. It assessed Indian needs and in January 1961 issued "The Indian American's Unfinished Business", a document which recommended Indian involvement in and determination of education programs affecting their lives. It asked for adequate scholarships, grants, and loans for higher education.

New programs were created by the Economic Opportunity Act, a part of the Johnson Administration's "War on Poverty". The Upward Bound and Indian Community Action Programs laid the groundwork for Indian-controlled, Indian culture-oriented community colleges that exist today.

Federal appropriations for Indian higher education doubled in 1963 and again the next year. BIA scholarship assistance grew almost as fast—623 Indians obtained financial assistance in 1961, 1,327 in 1969, and 1,700 in 1975.

The Higher Education Act of 1963 was the first to earmark funds for Indian junior colleges. In 1969, the Navajo Tribal Council created the first modern Indian college on an Indian reservation. With the establishment of the Navajo Community College, the movement to create tribally controlled Indian colleges accelerated. There are now 16 colleges chartered by tribal enabling legislation. These include Lakota Higher Education Center by the Pine Ridge Sioux in 1970, Sinte Gleska Community College by the Rosebud Sioux in 1970, Turtle Mountain (Chippewa) Community College in 1972, Standing Rock (Sioux) Community College in 1972, Sisseton-Wahpeton (Sioux) Community College in 1972, Fort Berthold Community College in 1973; and Lummi Indian School of Aquaculture in 1973.

Indians in the community college movement feels the system must be controlled by the community people and that they must have their own means of educating tribal members. The future leadership and even the ultimate survival of the tribe may depend on how well higher education institutions help the community find solutions to its everyday problems.

In 1972, titles I, III and IV of Public Law 92-318 provided funding for higher education of Indians. This legislation opens the door for academic and vocational community colleges, extension centers, student scholarships, endowments, and cultural training centers.

The need to make the Indian-owned and operated colleges more accessible to Indian students is clearly evident. A research paper found most reservation students choose a particular school not for the programs it offers, but for its proximity. It also reported that the dropout rate is higher for Indians attending schools a great distance from the reservation. It can also be assumed that Indians attending a junior college on or near the reservation have a better chance of success.

As might be expected, Indian colleges have monetary problems. To keep their doors open, they must maintain a full enrollment of tuition-paying students. Most Indian students are unable to meet the costs without help. For this reason, financial aid to Indian students is also necessary.

Student interns at the Institute for the Development of Indian Law in Washington summarized their problems:

> What we propose is an overhaul of BIA funding and monitoring system capable of using all funds appropriated wisely and with greatest amount of success. Second, we would like to see a program instituted by the Bureau to help assist medical students. We need doctors, we need more students, and to achieve this, we need adequate funding.

In May 1974, Paul A. Olson, Director of the Study Commission on Undergraduate Education and the Education of Teachers, Lincoln, Nebr., commented on the Indian Controlled Community College and University Act, saying that Indian culture:

> Constitutes a valuable resource both for Indian people and the rest of the nations.
>
> If the architectural knowledge, the herbal knowledge, the languages, the literative and the environmental knowledge of Native American cultures are this valuable to us, surely it is a small matter to make the sort of investment which will be required to sustain these colleges and to sustain the cultures which may be so valuable to all of us. Be assured those cultures will not be sustained as viable entities for integrating man and nature, if educational institutions conducted, controlled, and organized along Indian lines are not established at every level including higher education.
>
> It is thus, as preservers of a national resource and as trainees of professionals, that I see the reservation community colleges as operating primarily.

Government programs for Indian education historically neglected Indian culture. This omission could be addressed if universities were encouraged to develop special programs in the area of Indian culture. Progress is being made in higher education for Indians, but the desire by Indian students for college education far surpasses the programs available. As the Kennedy report summarized in its section on higher education:

> Indian students have expressed the desire for college educations. The consistently high dropout rates of Indian students, though, indicate the need for a more adequate education in the preparation for college and a better understanding by teachers, administrators and counselors of problems and needs of Indian students.

GENERAL RECOMMENDATIONS

The Commission recommends that:

Congress enact legislation for the transfer of all Federal education programs from their present agencies to the consolidated Indian agency recommended elsewhere in this report.

Congress enact legislation that would aid tribal governments in assuming the responsibility for control of education in accordance with their desires. Such legislation to include:

a. Amendments to Public Law 81–874 and Public Law 81–815 such that: (1) the dollars directed to aid schools educating Indian students would be funneled through a tribal monitoring system, then to the school; (2) a set-aside provision is made to cover costs of tribal administration.

b. Amendments to Public Law 93–638 such that: (1) a duly elected board of regents may be recognized as a unit representing tribes and tribal opinion to contract for and administer post-secondary schools with a multitribal population; (2) in the case of multitribal elementary and secondary schools, a duly elected board of regents, including at least one representative from each tribe, be recognized as a unit representing tribes and tribal opinions to contract for and administer those schools.

c. Amendments to Public Law 93–638 and Johnson-O'Malley such that: (1) Any dollars contracted for the education of Indian children through Public Law 93–638 and Johnson-O'Malley would pass through a tribal monitoring system. (2) In utilizing this contract or monitoring power with Public Law 93–638 or Johnson-O'Malley a tribe may decide the extent to which it wishes to control the educational system affecting its children. This decision runs the gamut from total tribal ownership and control to utilization of the tribal government only as a monitoring system for Indian education moneys. (3) If the tribe opts to set up an organizational unit to monitor funds, a set-aside provision should be made available to cover the costs of tribal administration.

d. Amendments to all Indian educaton legislation such that: (1) The State or local government not in compliance with agreements and contracts for Indian education programs can be sued by the tribe in a U.S. district court or in a State court of general jurisdiction. (2) The court may grant to the plaintiff a temporary restraining order, preliminary or permanent injunction or other order including the suspension, termination, or repayment of funds or placing any further payments in escrow pending the outcome of the litigation.

NOTE.—The language of the above two recommendations is taken from H.R. 13367—Revenue Sharing.

Congress appropriate funds to accomplish the following objectives:

a. To establish standards for Indian education and develop an accreditation system for Indian schools.

b. To train non-Indians who teach and work with Indian children as an interim measure until there are enough Indian educators.

c. To educate and prepare tribes who wish to organize and operate their own educational systems.

d. To subsidize a long-range effort to train and certify Indian educators for Indian schools.

e. To subsidize curriculum development and library development for Indian schools.

f. To provide an educatonal clearinghouse for information on teacher availability, new curricula, and special resources flowing between schools and tribes.

g. To give professional Indian educators the opportunity for regular input on new educational methods and resources to the tribes.

OFF-RESERVATION BOARDING SCHOOLS

The Commission recommends that:

Congress provide for the improvement of off-reservation boarding schools by enacting legislation to accomplish the following:

a. Define the goals and objectives for each school and create an academic emphasis to fit its goals.

b. Assure that juvenile corrections are the responsibility of the tribe and not the off-reservation boarding school.

c. Organize an admittance and transfer policy for students.

d. Provide for sufficient diagnostic staff and development specialists for each school.

e. Provide a curriculum that is responsive to the students' psychological and academic needs.

f. Assure that teaching and guidance staff are chosen for their ability rather than civil service rank.

g. Give parents and communities the opportunity to contribute ideas and participate in school procedure.

h. Give the school advisory boards real decisionmaking power, as indicated by the Indian Reorganization Act, and organize an elective process for advisory boards and boards of regents for all BIA schools.

i. Set up funding structures to separate off-reservation boarding schools from other BIA-funded schools.

j. Provide adequate financing and standardize accounting procedures and fiscal reports of all schools.

k. Remove postsecondary schools run by BIA from off-reservation boarding school status so the tribes have the option to control staff, budget, programs, enrollment levels, and student body.

SCHOLARSHIP

The Commission recommends that:

Congress provide funding through Indian organizations and tribes for scholarships in three academic areas: vocational education, traditional liberal arts education, and graduate level education.

Each Indian student who meets the requirements of section 411 (a)(1) of the Higher Education Act of 1965 be entitled to a grant in an amount computed under subsection (a) of section 411.

HIGHER EDUCATION

The Commission recommends that:

The Congress enact legislation which would carry out a program for funding and administering Indian postsecondary schools. Such legislation should include:

a. Funds for more Indian owned and operated colleges.

b. Funds for research in the area of Indian higher education to determine students' academic and psychological needs.

c. Funds to assess the needs of tribes and communities for certain types of vocations and professions.

d. Funds to establish liberal arts institutions on or near populous reservations.

e. Funds to establish institutions of higher learning specializing in the culture, languages, and traditions of Indian people.

f. Funds for specialized Indian higher education centers, such as the Center for Indian Law.

g. Federal funding to institutions of higher learning serving Indian students, similar to Johnson-O'Malley funds.

h. Accreditation for Indian postsecondary institutions be provided by an Indian designed and organized board.

WELFARE

Anyone who applies for welfare benefits faces a great deal of red tape. Indians have an even more difficult time because they are forced to contend with an ill-defined three-tiered system of programs on Federal, Federal-State and State-local levels. The confusion that arises from these overlapping and often conflicting programs has led to inefficiency and abuse in delivery of welfare services to Indian people.

This section will discuss welfare structure and define problem areas. The Review Commission does not recommend specific solutions, but rather points out areas needing additional research to bring about uniform, equitable delivery.

FEDERAL-STATE AND STATE-LOCAL ASSISTANCE

It is important to understand the effect that Federal-State and State-local welfare have on Indians because Federal, or BIA, welfare assistance only comes into play only after these avenues have been exhausted.

Federal-State programs refer to those promulgated under the Social Security Act, consisting of Aid to Families With Dependent Children (AFDC)[99] and Supplemental Security Income for the Aged, Blind and Disabled ("SSI").[100]

AFDC and SSI require States to provide a specific share of welfare costs in order to receive Federal funds. Both programs are referred to as "categorical assistance," as distinguished from general assistance or "relief" programs which are funded solely by the States and municipalities.

The right of Indians to benefits from the Social Security Act was determined shortly after its enactment. A 1936 memorandum from the Office of the Solicitor reported that while the Act did not specifically include Indians in its benefits, "certain terms, requirements and conditions in the Act indicate that all the aids and services are intended to be available to all 'needy individuals' without regard to race or status."[101]

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[99] 42 U.S.C. §§ 601–608 (1970) as amended, 42 U.S.C. §§ 601–608 (supp. II, 1972).

[100] 42 U.S.C. §§ 1381-1385 (supp. 1974). Effective January 1, 1974, SSI superseded three former separate areas of Social Security Act aid: Old Age Assistance 42 U.S.C. §§ 301 et seq. (1970), Aid to the Blind, 41 U.S.C. §§ 1201 *et seq.* (1970), and Aid to the Disabled, 42 U.S.C. §§ 1351 et seq. (1970).

[101] Memorandum Opinion (unpublished), Office of the Solicitor, Department of the Interior, Apr. 22, 1936, p. 1.

This opinion was based on the Act's provision, in connection with direct aid:

> 1. That a State plan must be in effect in all political subdivisions of the State. Title I, sec. (3)(a)(1); title IV, sec. 402(a)(1); title X, sec. 1002 (a)(1). Indian reservations are within State counties and other political subdivisions. *Porter* v. *Hall*, 271 Pac. 411 (Arizona 1928).
>
> 2. Moreover, no State plan is acceptable which imposes as a condition of eligibility . . . "any residence requirement which excludes any resident of the State" who has resided therein for certain periods. . . . Title I, sec. 2(b); (2); title IV, sec. 402(b)(1)(2); title X, sec. 1002(b)(1). The Indian inhabitants of a State are residents thereof.
>
> 3. Nor can a State impose any citizenship requirements which excludes any citizen of the United States. Title I, sec. 2(b)(3); title X, sec. 1002 (b)(2).[102]

The issue was first tested in *State ex rel. Williams* v. *Kemp*, in which the Supreme Court of Montana was asked to decide whether the State or the counties were responsible for Indian welfare benefits. It interpreted a State statute to require that the State general fund reimburse the counties for social security assistance to reservation Indians. In reaching that decision, the court said:

> The broad language of the Federal Social Security Act on the face made the grants to the States contingent upon the fact that no citizenship requirement should exclude any citizen of the United States from relief benefits. Indians are citizens of the United States . . . The Montana legislature, confronted with the question of choosing to accept or reject Federal grants, chose to accept them. To do this, it was obliged to meet the conditions imposed.[103]

Montana was not the only State that had difficulty accepting Indians on its federally supported rolls, there was considerable resistance. Arizona, for instance, passed categorical assistance laws in 1937, but it excluded Indians from coverage until 1954, despite threats that Federal funds would be withheld. It was not until funds were actually withheld and Arizona's suit [104] to compel payment was dismissed, that Arizona gave in.

During the termination period of the 1950's, San Diego County in California also attempted to limit State and county liability for Indian welfare. In *Acosta* v. *San Diego County*, the county contended it could deny welfare to Indians because they were not considered residents of the county for the purposes of gaining direct county benefits. The court of appeals found the county's contention a violation of the equal protection clause of the 14th amendment:

> The argument that responsibility for reservation Indians rests exclusively on the Federal Government has been rejected. . . . That reservation Indians are entitled to direct relief from either the State or County in which they reside was conceded in *State ex rel. William* v. *Kemp*. . . . The only issue there was which political body would bear the expense.
>
> From the conclusion reached that Indians living on reservations in California are citizens and residents of this State, it must therefore follow that under section 1, amendment XIV of the Constitution of the United States, they are endowed with the rights, privileges, and immunities equal to those enjoyed by all other citizens and residents of the State.[105]

The Supreme Court has never directly addressed the issue of Indian eligibility for Federal-State and State-local welfare, although it has held that race cannot be the basis of State discrimination.[106] Dicta in *Morton* v. *Ruiz* clearly included Indians under Social Security Act welfare benefits. The Court said: "Any Indians, whether living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which this State participates and no limitation may be placed on social security benefits because of an Indian claimant's residence on a reservation." [107]

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[102] Memorandum Opinion, supra, at p. 2.

[103] 78 P. 2d at 587.

[104] *Arizona* v. *Hobby*, 221 F. 2d 498 (D.C. cir. 1954).

[105] 272 P. 2d at 98 (1954).

HOW BIA GENERAL ASSISTANCE FITS IN

The general authority for BIA welfare programs is found in the following broad language of the Snyder Act of 1921:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care and for the following purposes:
>
> General support and civilization, including education.
>
> For relief of distress and conservation of health . . . And for general and incidental expenses in connection with the administration of Indian Affairs.[108]

The regulations covering BIA General Assistance are contained in an unpublished, looseleaf manual [109] available only to BIA workers. In *Morton* v. *Ruiz* [110] the Supreme Court found that BIA had failed in its procedural duties by not having its regulations duly published in the Federal Register and codified in the Code of Federal Regulations, as required by the Administrative Procedure Act.

Further, the Court found that the general assistance appropriations at issue were intended by Congress to benefit Indians who live "on or near" reservations, contrary regulations in the Manual. Thus, BIA general assistance is available to reservation Indians and those living nearby as long as congressional intent to appropriate such moneys is clear. The Court clouded the issue when it added that, given a scarcity of funds, "it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits." [111]

It is important to bear in mind that IBA general assistance comes into play when other avenues of assistance have been exhausted. The BIA manual states the following:

> (b) Unavailability of Public Assistance or General Assistance from a State or local jurisdiction. Individuals receiving public assistance in their own right, or whose needs are included in a public assistance payment are not available for Bureau general assistance.
>
> Indians for whom general assistance is actually available from a State, county or local public jurisdiction are not eligible for general assistance from the Bureau.

The phrase "actually available" in this regulation appears to leave room for case-by-case determination of BIA welfare eligibility. This is not the case, according to an article by Sarah W. Barlow and Martha W. Blue:

> If the BIA applied this rule to the individual circumstances of each applicant, as it does its other eligibility conditions, the rule would simply prevent duplica-

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[106] *Loving* v. *Virginia*, 388 U.S. 1 (1967) ; *Brown* v. *Board of Education*, 347 U.S. 483 (1954).
[107] 415 U.S. 199 (1974).
[108] 25 U.S.C. §§ 13.
[109] 66 I.A.M. §§ 3.1 *et seq.*
[110] 415 U.S. 199 (1974).
[111] 415 U.S. at 231.

> **tion of welfare assistance; but instead, the BIA uses it to declare all Indians in certain geographic areas ineligible for BIA General Assistance. The BIA relies on this rule, as well as on other factors, in deciding whether or not to operate its general assistance program in a specific location. For example, since Arizona and its counties refuse general assistance to Indians living on a reservation, the BIA operates its general assistance program on Arizona reservations, but since Utah permits eligible Indians on reservations to receive State general assistance, the BIA has no general assistance program in that state.**[112]

These authors point out, this policy discriminates against reservation Indians living in States with general assistance programs which include Indians. State programs are generally less beneficial than the BIA program. Moreover, inclusion in State programs precludes Indian recipients from benefits under the BIA program.

According to Barlow and Blue, "although the exclusion of reservation Indians from State (or local) general assistance poses constitutional problems, raising these issues would only harm Indians, because virtually all State and local general assistance programs provide less money to recipients and are more restrictive in their coverage than BIA general assistance." [113]

BIA has ignored the reality of welfare "benefits" by its refusal to supplement State categorical welfare when such benefits do not meet 100 percent of BIA established needs.[114] To say that participation in any program no matter how inadequate, supplants the goal of the higher standards established by BIA, subverts the clear intent of the Snyder Act.

CHILD PLACEMENT

The policy of removing Indian children from their homes and tribal settings to "civilize" them began in the 1880's with the advent of boarding schools. Indian children are still being removed from their tribal culture. Today, however, this is done through the adoption of Indian children by non-Indian families and their placement in non-Indian foster care homes and institutions.

Two basic jurisdictional questions exist: who decides whether an Indian child needs to be removed from home; and where and how that child is to be raised. Until very recently, such decisions have been made by non-Indians without tribal input. Today, the tribes are beginning to reassert their historical role in the care and protection of Indian children.

While both Indians and non-Indians are concerned with child placement, social workers without training or understanding of Indian lifestyle or culture are ill-equipped to make judgments about the adequacy of the Indian child's upbringing. Even if one assumes the social worker is making the right decision, there should be an effort to maintain the family unit while problems are being solved.

RECOMMENDATIONS

The Commission recommends that:

Congress hold oversight hearings to clarify the division of responsibility between Federal and State agencies involved with Indian affairs; including BIA, HEW, IHS, Office of Civil Rights, and Social and Rehabilitation Services; and direct these agencies to consult with State agencies to determine the causes of the breakdown in the delivery of services to Indians by the States.

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[112] 51 N. Dak. L. Rev. 31 at 41–42.
[113] *Id.*
[114] 66 I.A.M. 3.1.4(B).

The BIA and HEW promulgate regulations to clarify that Indian trust money and land is not to be considered an asset by State and county governments in determining eligibility for welfare programs.

BIA be required to publish in the Federal Register and in the Code of Federal Regulations their procedures and guidelines for general assistance under the Snyder Act.

Procedures and practices used in the BIA's 64 local welfare offices should be standardized and made uniform, ending the practice of discretionary action on the part of the local BIA caseworkers.

Receipt of State or local general assistance should not make an Indian ineligible for BIA assistance when supplemental aid is needed.

CHILD PLACEMENT

The Commission recommends that:

Congress, by comprehensive legislation, directly address the problems of Indian child placement and the legislation adhere to the following principles:

a. The issue of custody of an Indian child domiciled on a reservation is the subject of the exclusive jurisdiction of the tribal court where such exists.

b. Where an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child be given reasonable notice before any action affecting his/her custody is taken.

c. The tribe of origin have the right to intervene as a party in interest in child placement proceedings.

d. Non-Indian social service agencies, as a condition to the Federal funding they receive, have an affirmative obligation—by specific programs—to:

(i) provide training concerning Indian culture and traditions to all its staff;

(ii) establish a preference for placement of Indian children in Indian homes;

(iii) evaluate and change all economically and culturally inappropriate placement criteria;

(iv) consult with Indian tribes in establishing (i), (ii), and (iii).

e. Significant Federal financial resources should be appropriated for the enhancement or development, and maintenance of mechanisms to handle child custody issues, including but not limited to Indian operated foster care homes and institutions. In reservation areas such resources should be made directly available to the tribe.

CHAPTER NINE

OFF-RESERVATION INDIANS

Despite the fact that the Federal Government must assume some responsibility for the present-day problems of urban Indians, the government has actually refused to extend those services to urban Indians which they would otherwise receive if they lived on their reservations. Urban Indians do not receive the special Federal programs which are directed to Indians. Strangely enough, they often do not receive the services directed to non-Indians, either. Local, State and county welfare programs often refuse to serve Indians on the grounds that they are the responsibility of the Federal Government.

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CHAPTER NINE

OFF-RESERVATION INDIANS

Overview

Almost half of the United States Indian population lives outside the boundaries of Indian reservations. In 1970, 340,000 lived in cities and six cities had Indian populations which are larger than those of any reservation except the Navajo Reservation.[1]

Many of these people moved to cities because of Federal policies. The earliest movements of tribal people away from tribal lands were often the indirect result of policies which diminished the reservation land base to such an extent that Indians had to find homes elsewhere. Educational policies added to the trend by removing Indian children from their homes to off-reservation boarding schools where the children were taught skills which could not be used on reservations. Policies which neglected reservation development, of course, made reservations undesirable places to remain and also affected migration. Some policies, particularly following World War II, were more directly responsible for relocating Indians away from reservations. In addition to robbing reservations of some of their best talent, these policies have resulted in dire circumstances for the large numbers of Indian people who find themselves in urban ghettoes, today.

Despite the fact that the Federal Government must assume some responsibility for the present-day problems of urban Indians, the Government has actually refused to extend those services to urban Indians which they would otherwise receive if they lived on their reservations. Urban Indians do not receive the special Federal programs which are directed to Indians. Strangely enough, they often do not receive the services directed to non-Indians, either. Local, State and county welfare programs often refuse to serve Indians on the grounds that they are the responsibility of the Federal Government.

In this situation, the development of Indian community service centers has been the one optimistic factor. The Federal Government offers these centers little encouragement, however, and they become entangled in bureaucratic and jurisdictional fights.

New policy directions can have a very clear beneficial impact on the desperate urban Indian situation if administrative programs utilize and encourage urban Indian centers.

History [2]

This review of off-reservation Indian history will examine the ways Federal policies have splintered tribes and either forced or encouraged

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[1] Sar A. Levitan and William B. Johnston, Indian Giving (Baltimore, 1975), 2–3.

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Indians to move away from reservations in an effort to end the "Indian problem." It will also show how these moves have not solved the problems of poor health, poverty, limited employment opportunities, poor education, and alienation, but have merely transferred them to rural and urban settings.

In the late 19th century, after the Federal Government had succeeded in reducing Indian tribal holdings to small reservations, the policies of neglect, dependency, and assimilation were established. While there were some meager efforts at "reservation development," no significant system of economic and cultural protection was created to permit Indian tribes economic viability and independence. Reservations were often viewed as camps where assimilative tools would be provided prior to the Indian's dispersal among the white population.

Even reservations, however, posed a threat to the Federal Government because they provided a place where Indian people could not be effectively kept from maintaining their identity and culture. So, attempts were made to parcel out tribal lands to Indian individuals in an effort to destroy the communal cohesiveness of tribal society. The continuing assumption on the part of the Federal Government was that assimilation was the Indian's fate. Legislation was based on this assumption.

One of the most obvious examples of Federal action which broke up reservations, strained tribal cohesion, and encouraged subsequent migration of thousands of Indians to other areas was the General Allotment Act of 1887.[3] Indeed, it is not inaccurate to say that the migration of the Indians was a calculated result of this legislation.

The General Allotment Act was, of course, just one example of a long line of Federal legislation and administrative actions which were either designed to or inadvertently resulted in dispossessing Indians of their lands and driving them to seek jobs off the reservation.[4] Oftentimes, the Federal Government was the decisive influence weakening (and sometimes dissolving) [5] the tribal governing structures; it stood by while most of the Indians' choice lands were taken from their control and the resources from the remaining lands were destroyed; it moved Indians off the reservation for job training and employment. More often than not, job training in the cities turned out to be irrelevant, employment opportunities were nonexistent, and furthermore, the Federal Government neglected to provide meaningful assistance in housing, education, or health. As the final insult to those Indians who were victims of this concerted campaign to assimilate them, the Federal Government refused and largely still refuses to recognize its

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[2] This historical review is condensed from an extensive history researched and written by Dennis Carroll for Task Force Eight.

[3] 24 Stat. 388.

[4] Also during the 1870's, the Federal Government began the Indian boarding school system which was "designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language and prepare him for never again returning to his people." [U.S. Cong. Senate Committee on Labor and Public Welfare, Indian Education: A National Tragedy—A National Challenge, S. Rept. No. 91–501, 91st Cong., 2d sess. 12 (1969.] Some 20 years later, the Indian Commissioner stated that it was the "settled policy of the Government to break up reservations, settle Indians upon their own homestead, incorporate them into the national life, and deal with them not as nations or tribes or bands, but as individual citizens." Rep. Comm. Ind. Aff., 1890 at VI.

[5] Felix Cohen described the systematical destruction of tribal governing structure and powers of the Five Civilized Tribes. F. Cohen, Handbook of Federal Indian Law, 427–434 (1942 ed.).

responsibility to provide them with the services they would receive on their reservations.

Education through the off-reservation boarding school was another method utilized to alienate Indian people from their culture. This educational model for Indian youth was directed at developing young men and women who could join the mainstream of white, Christian society. Instead, it left a legacy of frustration, depression, and alienation that made Indians unable to pursue the traditions of their fathers, but left them unequipped to participate in white-dominated economy.

The increasing number of Indian people living off-reservation was noticed in two Indian policy studies in the 1920's. The Senate Subcommittee on Indian Affairs' Survey of the Conditions of the Indians of the United States was followed by the well-known Meriam Report.

The Subcommittee conducted and published hearings across the United States, and largely provided the data base for the more concise Meriam Report. The subcommittee's hearings in California were particularly directed at the burgeoning problem of urban Indians. The Government was beginning to notice a new problem area in Indian affairs, but responsive policies would not be instituted within the next half-century. Whatever insights might have been gained from hearing testimony were lost when the Meriam Report published its chapter on "Migrated Indians", and relied on the material presented by Indians' employers rather than the Indians themselves. On this choice of information, the Meriam Report recommended that "no effort be devoted toward building up an independent organization in such cities for migrated Indians, but rather toward establishing cooperative relations with existing agencies which serve the population as a whole." [6]

The Snyder Act of 1921 had given the Commissioner of the Bureau of Indian Affairs broad latitude in spending appropriations for Indian affairs and in developing programs to meet Indians' needs. The legislation simply stated that appropriations were to be used for "Indians throughout the United States." Certainly that clause is broad enough to include those Indians who were forced away from reservations by land policies, by Federal encouragement, or by economic needs, but the Bureau did not choose to view its role in so expansive a way. The Meriam Report, no doubt, gave scholarly support to this bureaucratic timidness. For many years, the Bureau's failure to serve the increasing urban Indian population went unquestioned.

After World War II, Indian perceptions of reservations and cities began to change. The war showed many Indians a world they had never seen and seldom heard of. There were opportunities for achievement in the military service which they had never found on reservations. They proved themselves capable of using those opportunities and returned home with confident hopes that they could make their reservations better places to live. This hope soon turned to despair as they tackled the obstacles which impeded (and today still impede, *see* chapter 7) reservation development. Many Indians, however reluctant to leave their communities and families, decided that low quality subsistence was the only future for the reservations and set off for the cities to find work. By 1951, more than 17,000 Navajos worked away from the reservation, primarily on railroads and agriculture.

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[6] Meriam, Lewis, The Problem of Indian Administration, "The Migrated Indians" ch. XII.

At the same time, the Federal policy of assimilation manifested itself in a new way. A theory that reservations were overpopulated gained credence. By 1954, a congressional report entitled, "Survey Report on the BIA" generalized that "most of the reservations are overpopulated, and could not support the population at anything approaching a reasonably adequate standard of living."[7] Rather than pursuing a way to make Indian homelands financially secure places to live, the Federal Government chose to follow a simpler approach: relocation of Indians away from the reservations. Thinning out the population of reservations, however, did not solve the problem. The fact that Indians left the reservation did not mean they were willing to stop being Indians; and whether or not reservations bred some social problems, it could not have been assumed that those problems would be shed at the reservation boundaries. Nevertheless, Federal policy followed exactly that simplistic an approach. Transportation funds were provided, but relocation services were not.

The Federal Government not only failed to provide needed services to the Indians it relocated, but actually refused to provide those services. The Federal relocation program was to be initiated by the BIA but was left to be implemented by local, State and county assistance programs, or churches or humanitarian organizations. The only thing that was shrugged off at reservation boundaries, it turned out, was Federal responsibility.

Indians affected by relocation were not given an opportunity to tell their side of the story until the National Council on Indian Opportunity held hearings in five major cities in 1968 and 1969.[8] The numerous criticisms that were heard at this time fell into three categories: (1) The lack of orientation in relocating from reservations to cities; (2) the low quality of opportunities for work; (3) the confusion of where to turn for necessary services. Federal policy had ignored particular difficulties Indians faced in the cities, difficulties such as language barriers, questions of where to find services or help in emergencies, and the most fundamental problems of daily survival.

The special problems which Indians face when they are away from their reservations are another unique aspect of the Federal-Indian relationship. Whatever historical forces have contributed to these problems, it is apparent that the situation is significant enough to deserve Federal attention.

To solve these problems which the Federal Government largely created and then totally ignored, Indian people themselves have contributed the most recent and the most constructive development in the history of off-reservation Indians. That is the development of urban Indian service centers. Some of these centers have evolved from very small groups organized for recreational purposes into multifaceted operations capable of sustaining programs in educational and vocational training, defense of tenant rights against unscrupulous landlords, psychological and career counseling, various kinds of entertainment, and the provision of emergency relief. There can be no doubt that today the Indian centers are a sound and creative response to the Indians' frustrations with their urban environment.

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[7] U.S. Congress, House Committee on Interior and Insular Affairs, "Survey Report on the Bureau of Indian Affairs," 1954, p. 23.

[8] National Council on Indian Opportunity, hearings in Los Angeles, Dallas, Minneapolis-St. Paul, San Francisco, and Phoenix, 1968–69.

The urban Indian service centers have not, however, completely solved the problems urban Indians face. In fact, they have encountered many obstacles which the Federal Government could remove, and have clarified a new policy problem in the administration of Federal programs for urban Indians. There is a unique relationship between the Federal Government and urban Indians, both because of the uniqueness of the problems urban Indians face and because of the uniqueness of the historical factors which made some Indians urban residents. How to administer that unique relationship has not yet been determined. Instead of taking the initiative and providing services to these Indian people, the Government has chosen to argue over responsibility and jurisdiction; these arguments continue to the present day.

POLICY AND LAW RELATING TO OFF-RESERVATION INDIANS

The following discussion examines briefly the concept and scope of the Federal trust responsibility to off-reservation Indians.[9] The exclusion of nonreservation Indians from the Federal trust relationship does not follow from a careful legal analysis but rather emanates from perceived practical considerations and the attitude, "it has always been done that way."

While the Federal trust responsibility extends from the Federal Government directly to the tribe, it must be noted the tribe as an entity does not exist without its people. Thus, it can be said that the ultimate beneficiary of the trust is the individual Indian as a member of his tribe.[10]

This is obviously true, for example, when the Federal Government acts to protect an individual Indian's land from being taxed by the State.[11] It is also true, however, when action is taken to protect a tribe's water resources on the reservation.[12] Individual Indians, including most of those living in urban and other nonreservation areas, generally identify themselves in the context of their tribal affiliation.

Probably few, if any, Federal administrators or legislators would disagree with the above comments. Dissent increases, however, when it is suggested that the Federal Government's trust responsibility applies to tribal members living off the reservation as well as to those living on Indian lands. This dissent results partially from the fixed thinking predominant in government that the Indian trust equates with land and nothing more, and partially from the mistaken notion that if an Indian leaves his reservation, it is with a conscious understanding that he is putting his tribe behind and assimilating to non-Indian soceity. As the historical review points out, more often than not, individual Indians who chose to leave reservations did so because they could not find jobs, or decent housing, or a quality education there. Moreover, many were practically forced to leave by BIA insistence, and in this situation the Federal responsibility is certainly clear.

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[9] *See* ch. 4 for a complete discussion of the Federal trust responsibility.
[10] *See U.S. v. Holliday*, 70 U.S. 407 (1865).
[11] E.g., *Board of County Commissioners v. Seber*, 318 U.S. 705 (1943).
[12] *Winters v. U.S.*, 207 U.S. 564 (1908).

Most importantly, Federal policy should not be based on the Government's intention to dictate any group's culture. In discussing Indian policy, of course, this point becomes crucial. Assimilation has not succeeded and has largely been discarded. For urban Indians, however, there are many residual administrative obstacles which were constructed on the theory that off-reservation Indians gave up their tribal status, or should have given it up. The overwhelming majority of Indians in this country continue to be tribal members, regardless of where they live and regardless of whether or not their tribe is recognized by the Federal Government, and in spite of continuous policies aimed at destroying tribal society. The Federal Government's trust obligation to Indian tribes should extend to these tribal members as well as to their reservation brothers for there is no sound legal or political reason to discriminate against them.

No court, no general act of Congress, certainly no constitutional provision states that the Government's special responsibility to the Indian people stops at the reservation gate. The concept of trust responsibility is most often applied in the context of recognized reservation Indians, but several court decisions have found that the Government's legal duty is not so limited. For example, to benefit from the Federal responsibility to protect trust lands, the individual Indian need not reside on a reservation;[13] it makes no difference that he is a United States citizen as well as a tribal member, for "citizenship is not incompatible with tribal existence or continued guardianship."[14]

The unique need of nonreservation Indians has not been totally ignored in modern legislation,[15] but much of the intent of those Acts has been circumvented either by administrative neglect or outright refusal to provide services targeted to Indians.

Before 1921,[16] there had been no specific authorization for the appropriation and expenditure for most of the programs which the Bureau of Indian Affairs had come to maintain for the benefit of Indians. In the Congress, appropriations for the Bureau of Indian Affairs were subject to a point of order objection which frequently resulted in cumbersome and time-consuming maneuvering while Indian programs hung in suspense. This frustrating process was at least partially relieved by passage of the Snyder Act which authorized items of appropriations in nine broad program areas:

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[13] *Mott* v. *U.S.*, 293 U.S. 848 (1931).

[14] *U.S.* v. *Nice*, 241 U.S. 591, 598 (1915).

[15] E.g., sec. 302 of the Comprehensive Employment and Training Act of 1973, 87 Stat. 839, makes nonreservation Indian groups and organizations eligible as prime sponsors for manpower programs.

Under the Native Amercian Programs Act of 1974, 88 Stat. 2323, the Office of Native American Programs in the Department of Health, Education, and Welfare has the objective to provide direct support for self-determination programs aimed at improving the health, education, and welfare of Native Americans both on and off reservations. Legislative history of the Act suggests that Congress intended ONAP to expend the largest share of its budget on programs for nonreservation Indians. Analysis of ONAP grantees, however, indicated that approximately 60 percent of its budget is going to reservations.

Public Law 93–638, passed on Jan. 4, 1975 (88 Stat. 2203) also includes nonreservation Indians as eligible contractors under the provisions of the Act by defining a tribal organization as any "recognized governing body of any Indian tribe" or "any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization . . ." sec. 4(c).

The recent passage of P.L. 94–437, title V, indicated the Federal Government's recognition of the urban Indian's health problem; however, rather than solving the problem, it highlights many of the complex issues surrounding urban Indian health care. As well as other issues, P.L. 94–437 highlights the following needs: (1) identification of all public and private health service resources within the urban center which may be available to urban Indians; (2) assistance of urban Indians in becoming familiar with and utilizing such resources; and (3) provision of basic health education to urban Indians.

[16] 25 U.S.C. 13.

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> General support and civilization, including education.
>
> For relief of distress and conservation of health.
>
> For extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies.
>
> For the enlargement, extension, improvement, and repair of the buildings and grounds of existing plants and projects.
>
> For the employment of inspectors, supervisors, superintendents, clerks, field matrons, farmers, physicians, Indian police, Indian judges and other employees.
>
> For the suppression of traffic in intoxicating liquor and deleterious drugs.
>
> And, for general and incidental expenses in connection with the administration of Indian Affairs.

A pertinent interpretation of the Act was made in December, 1971, by Assistant Solicitor for the Division of Indian Affairs, Department of the Interior, Charles Soller. In that written opinion to the Commissioner of Indian Affairs, Mr. Soller stated that: "On its face, the underscored language is abundantly clear and requires no interpretation. Literally, it authorizes the expenditure of funds for the purposes within the named program categories for the benefit of any and all Indians, of whatever degree, whether or not members of federally recognized tribes, and without regard to residence so long as they are within the United States * * *. With language so unequivocal, it is subject to the general rule of the law that plain and unambiguous statutory language will be followed * * * .[17] The opinion states that the Snyder Act will support a broader eligibility for Bureau services, but it cautions the Bureau against extending BIA services to all Indians without first considering other "statutory limitations" [18] and without first consulting with appropriate congressional committees. Apparently, however, the Bureau never got a chance to take those other two steps because the Commissioner received specific instruction from the then Assistant Secretary, Harrison Loesch, not to divert the Bureau's "attention and limited funds from our basic responsibility of serving on-reservation Indians.[19]

Not only was the rationale weak which the Assistant Secretary presented for this limitation of services, but the statement itself shows a lack of understanding. He apparently understood that no off-reservation Indians were receiving Bureau services, except in special hardship cases. But, as explained in considerable detail by the Supreme Court in *Morton* v. *Ruiz*, the provision of BIA services "clearly has not been limited to reservation Indians" only.[20] Native Americans in Oklahoma and Alaska have received and still are receiving certain services from the BIA, whether they reside on or off the reservation.

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[17] U.S. Dept. of the Interior, Office of the Solicitor, Scope of the Snyder Act of Nov. 2, 1921, 42 Stat. 208, 25 U.S.C. sec. 13, memorandum of Commissioner of Indian Affairs from Asst. Solicitor Division of Indian Affairs, Dec. 9, 1917.

[18] *Ibid.*

[19] U.S. Dept. of the Interior, Office of the Assistant Secretary, Adherence to Our Long-Standing Policy of Not Providing Special Bureau of Indian Affairs Services to Off-Reservation Indians. Memorandum from Asst. Secretary for Public Land Management Harrison Loesch, to Commissioner of Indian Affairs, Jan. 16, 1970.

[20] 415 U.S. 199, 212 (1974). This is also true for services provided by the Indian Health Service.

The Indian relocation program and general assistance benefits connected with that program are extended to nonreservation Indians.[21] Special vocational training programs have long been made available to off-reservation Indians.[22] Educational services had similarly been extended to them by virtue of the Johnson-O'Malley Act.[23]

It is true that the Court in the *Ruiz* case did not interpret the Snyder Act as *requiring* the Bureau to provide its social services program benefits to all Indians. But it is equally true that the decision interpreted the Snyder Act in broad enough terms so that such an application would be permissible. It stated that:

> We need not approach the issue in terms of whether Congress intended for all Indians, regardless of residence and of the degree of assimilation to be covered by the general assistance program. We need only ascertain the intent of Congress with respect to those Indian claimants in the case before us.[24]

Thus, the Court chose to avoid a definitive judgment on the overall issue by limiting its holding that the Bureau of Indian Affairs has the duty to provide general assistance services to Indians living "on or near the reservation" and who maintain close economic and social ties to the reservation. In spite of this requirement, BIA Manual still blatantly states that it limits eligibility to "on-reservation" Indians plus Oklahoma Indians and Alaskan Natives.[25]

The persistent refusal of the Bureau of Indian Affairs to address the problems of off-reservation Indians and to accept responsibility for fostering programs which will meet the needs of these Indian people, underscores a very basic discrepancy in the United States Indian policy.

The agent entrusted to carry out the trust which the United States assumes in its relationship to Indian people, should be eager to carry out that trust in whatever area it may encompass. To deny the rights of Urban Indians is to question the position of all Indians in United States policy. As Syd Bean, Executive Director of the Phoenix Indian Center testified at a Task Force Eight hearing, "if the off-reservation Indian communities are forced to terminate their rights for special Indian services then the Federal Indian relationship is threatened for all Indians." [26]

The Urban Environment and Urban Solution

Between the intentions of the lawmakers and the reality of regulatory actions lies the service gap that confronts the urban Indian. The result is untold desperation and waste of human resources.

Most Indians who migrate to the cities say they would have preferred not to do so at all. Still, the census figures for the years 1960–1970 show a rate increase of from 30 to 45 percent, and an HEW report published in 1970 sheds some light on the reasons.[27] The report showed that the most apparent shift from reservation to city was among those of prime employment age, between 20 and 40. It also showed that older Indians—those beyond the age of peak employment—moved back to their reservation. The report concluded that the lack of job opportunities in rural and reservation areas lent impetus to the migration.

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[21] 25 U.S.C. sec. 471. *See Morton* v. *Ruiz*, 415 U.S. 199 (1974).

[22] *Morton* v. *Ruiz*, 415 U.S. 199 (1974).

[23] 25 U.S.C., sec. 452.

[24] 415 U.S. 199, 211 (1974).

[25] 66 Indian Affairs Manual, sec. 3. 4. *See* generally, V. Deloria, Jr., "Legislative Analysis of the Federal Role in Indian Education," contract for the Dept. of Health, Education, and Welfare, 1975.

[26] Written testimony submitted by Syd Beane at a hearing conducted by Task Force Eight, Feb. 9, 1976, p. 14.

[27] "A study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census: vol. III, American Indians." Office of Special Concerns, Office of the Assistant Secretary for Planning and Evaluation, Dept. of HEW, 1974.

The survey and results of the hearings by Task Force Eight affirmed that most Indians move to urban areas with hopes for jobs or for finding better jobs than on the reservation and rural areas.[28]

Regrettably, this expectation has often remained for the most part unfulfilled. The HEW report suggests that low employment may be due to inadequate vocational training,[29] a conclusion supported by the Commission's finding in two areas. One is that educational facilities on reservations are limited in standard, and the reservation is where most Indians receive their education. The other is that Indians who are educated in programs initiated outside the BIA often find that the skills they learn are not salable, and that job placement activities are limited. To date, employment assistance has been geared toward placing Indians in low-paying, entry-level jobs, rather than orientation and training for positions that could lead to upward mobility.

It has only been in the last 5 years that the BIA has ostensibly changed their former "relocation" policies. The new thrust, announced by Commissioner Louis R. Bruce in 1972, was a policy advocating for the end of termination era programs. Some of the more imaginative uses of employment assistance funds has followed emphasizing on-reservation training for tribal economic programs. Unfortunately, this emphasis is too late for those Indians who have employment and social problems in the cities.

The lack of employment opportunities leads to a downward spiral that reduces the urban Indian's life to a struggle for subsistence. For example, the private practice system of health care is certainly beyond the financial reach of most newly arrived urban Indian families. They must depend on public services. Yet here, the service gap reveals itself again. Ineligible for Indian Health Service assistance because he is off the reservation, the urban Indian finds that other means of finding medical attention are closed off as well.

Non-Indian health service hospitals are often reluctant to admit Indian patients for fear they will not pay. Local welfare agencies and charitable organizations often have the same fear, compounded by a belief that all Indians are the responsibility of the Federal Government. These agencies already juggle funds and personnel to serve as many needs as possible and often deny Indians treatment entirely or serve them in a superficial way.

Yet, the urban Indian often has special problems requiring treatment that is costly, prolonged and, to be successful, must be based on understanding of complex sociological factors. Two examples are the high incidence of both alcoholism and drug abuse. Both leave the urban

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[28] Response from 62 organizational questionnaires regarding the needs of urban Indian communities showed employment needs for the most frequently mentioned and respondents characteristically mentioned this before any other.

[29] *Ibid.* HEW report, p. 51.

Indian not only in wretched physical condition, but also in danger of social repercussions, jail, and repeated fines.

Few alternatives exist in the areas of housing. Urban Indians, unschooled in rents, mortgages, or leases because of their lives on the reservation, are often targets for unscrupulous and dishonest landlords. Lacking preparation, orientation, and money, the Indian often finds himself in overpriced, substandard housing located in marginal neighborhoods.

If he tries to ease the financial and emotional burdens by sharing living quarters with another family, the results are often unsatisfactory. Overcrowding and unhealthy living conditions are two immediate results, and harrassment from landlords is almost certain to follow. Families in particular often become discouraged at this point and return to the reservation, remaining only until resources are exhausted to try the cities once again.

This back-and-forth migration works to the Indian's disadvantage. The task of gathering information that will document the problem is difficult and programs that could be funded by grants are hard to justify. It also limits the experience of social welfare agencies with unique Indian problems. Thus it becomes hard for these agencies to become conversant with the specific problems and to assist Indians accordingly, even if funds and staff were available.

One solution has been proposed and tried, with some success. Until recently, the Snyder Act provided for equity grants to be used in making downpayments on homes. These grants were available to relocatees who remained in the same city for 3 to 5 years. The programs was recently cut back, a casualty of economic pressures that have reduced funding for social service programs. Reinstituting it would be highly effective, particularly if it were extended to all Indians.

THE URBAN CENTERS

In this bleak picture, the only real source of help for city Indians has been the urban centers that grew spontaneously out of informal Indian community get-togethers. Indians who moved to cities found that they shared many of the attitudes and the problems of other urban Indians. Across tribal differences, they immediately established friendly ties with Indians who were already established in the cities and sought to help Indian newcomers as they moved into the cities. Eventually, this feeling of comradeship inspired the idea that Indians could help each other out if they organized Indian Community Centers. These centers called "urban centers" present a number of options for Indians facing the urban world. Unfortunately, the Federal Government has failed to recognize the significance and utility of these centers for administering, or assisting in, the implementation of Federal programs for urban Indians.

For newly arrived urban Indians, the center's first function is to provide emergency care. This care may range from provision of food and clothing to finding housing by tracking down relatives or keeping up with available apartment and home listings. After dealing with these emergencies, services run the gamut from education to health care to psychological assistance.

It should be emphasized that urban Indians have done much to add to the cultural diversity and richness of many of the communities in which they live. Many cities have become justifiably proud of the Native American population. As a matter of fact, cities like Los Angeles have set the pace with support of Mayor Tom Bradley and other city officials in advocating for their Indian residents. Since this is particularly a discussion of the rule rather than the exception, we must say that the city of Los Angeles is one of the rare exceptions.

The reader should not suppose that each urban area is serviced by a highly integrated and consolidated agency called an "Indian Center." In many locations, this is a recent effort. In others, Indian centers have existed and worked with many other Indian organizations for a number of years. As Thomas Greenwood, acting president of the Indian Health Service, Inc., of Chicago, Ill., stated in his comments on the American Policy Review Commission's tentative final report:

> In Chicago and probably in many other cities as well, a network of more than twenty Indian organizations services the total population. Several are very general and inclusive in the programs that they offer; others concentrate on specific issues * * *. The reasons for the multiplicity of organizations are complex—relating to administrative convenience, tribal divergence, certain peculiarities in traditional modes of organization and attitudes toward power, circumstances in funding, and accidents of history. It is not clear whether a single comprehensive agency handling Indian programs in a given city is feasible—or desirable. To designate "Indian Centers" as the recipient of funds without considering the question is simply to invite problems.

Suffice it to say, however, that the model center providing multiple services seems to be the most efficient and practical method of delivering assistance whether run by one Indian center board of directors or by a board of several participating organizations.

Centers in many cities have set up educational programs, organized job banks and given moral support to those seeking employment. However, efforts are impeded because there is no mechanism for coordination of BIA vocational training programs. Though urban centers keep up to date lists of job opportunities, this knowledge is not used as the basis for the BIA vocational training program. Thus the BIA may train welders in cities offering opportunities for computer programers. Indians themselves have organized more innovative approaches to funding jobs in the city.

The Bureau of Indian Affairs continues to support Employment Assistance Offices in most cities with large Indian populations. Yet, these offices do not work with "unofficial" urban centers which are the point of contact for most Indians seeking work. BIA Employment Assistance is one of the most needed services for urban Indians, but ironically most urban Indians do not meet eligibility requirements. It is extremely unfortunate in that Federal programs neglect to use grassroots solutions to this problem.

The most difficult off-reservation service is health care. Physical requirements for facilities and fiscal requirements for personnel make it difficult for the urban center to attempt primary care, let alone the specialized therapeutic services that Indians need. Though Public Law 94–437, title V indicated the Government's recognition of the problem, it set up criteria for assistance that are difficult to fulfill.

The law states that an urban center must "determine the Indian population which are or could be recipients of health referral or care services . . ." and "identify gaps between unmet health needs of urban Indians and the resources available to meet such needs." The problem, of course, is the migratory patterns of urban Indians who, defeated by the lack of opportunities available to them in either reservations or cities, often move back and forth from reservation to urban centers Because population determinations are the basis upon which aid is provided, urban Indians are once again short changed.

NEW COMMUNITIES AND CONTINUING SERVICES IN NEW ENVIRONMENTS

Perhaps the most important contribution of the urban centers to the Indian living in cities has been a psychological one. Having left the tribal community, and often, their families, Indians feel isolation and loneliness. They developed these centers as places where such needs are partly satisfied and where they can join together in social gatherings that substitute for the personal security of the reservation. Some of the centers have evolved from very small groups organized for recreational purposes into multifaceted operations capable of sustaining programs in education and vocational training, defense of tenant rights against unscrupulous landlords, counseling, various kinds of entertainment and the provision of emergency relief. There can be no doubt that these Indian service and cultural organizations are a firmly based and creative response to Indian problems.

The Indian service centers present an ambitious range of services and objectives.

Unfortunately, they must rely on donations and volunteer work. Moreover, leaders who operate these centers are often volunteers and usually overworked. They serve out of a feeling of responsibility to the Indian community. While this is one of the dynamic and inspiring aspects of the development of urban centers, it has an unfortunate long-term effect in that there are necessarily frequent changes in leadership. While individual centers may expand or collapse, it is important to realize that the majority of urban centers have provided, and are continuing to provide, valuable services to people who are inadequately assisted through other channels. Moreover, they provide these services without usurping the relationship of the individual Indian to his tribe. The centers strengthen the urban Indian's ties to his cultural heritage by providing necessary facilities and services within an Indian setting. These organizations reinforce, rather than destroy, Indians' identification with their tribes and their heritage.

Because of the broadbased, highly sensitive services these urban centers provide, the Commission believes that their role in assisting Indians should be strengthened with trained staff and money. The Federal Government should realize that urban centers, created seperately and directed by Indians themselves, are an effective instrument for reaching the Government's goals of assisting urban Indians.

Indian centers suffer from a lack of management information and procedural standards. Like their reservation-based counterparts, tribal governments, they are often expected to know the rules when they do not have them and to live up to unexplained standards. Provision of data on ways to effectively organize and manage the delivery of human services would be of great assistance in enriching the role for urban centers.

Fiscal and management assistance is necessary if these centers are to provide the kind of service that will enable their people to live productive lives. This assistance should be administered in several ways.

In employment, the most expedient way to provide assistance is to build on the philosophy of Indians operating Indian programs. This would entail turning over BIA Employment Assistance Offices and their programs to urban centers.

Furthermore, it would provide an administrative base necessary for an urban assistance program. Administration could be carried out by existing urban Indian centers in close cooperation with tribal governments.

The Commission devoted a great deal of time to studying this alternative. Part of the study involved contacting urban center directors. While many directors felt the centers could administer funds the best, they acknowledged that tribal governments should also play an important role. As these governments stabilize politically and economically, they could be practical mechanisms for managing funds for their own membership.

Many programs now directly administered by Federal, State, or local governments are often contracted out to private or public organizations. These are contract awards for urban services which would not be otherwise allocated to Indian tribes. Urban Indian organizations, however, are frequently discriminated against in these kinds of situations, and private non-Indian contractors benefit from contract opportunities which should properly be delegated to Indian professional people. Indian service centers, once given the opportunity and clear identification of the obligations that go with it, are very capable in hiring professionally qualified personnel.

RECOMMENDATIONS

The Commission recommends that:

1. The executive branch of the Federal Government conduct a detailed examination of assistance programs and need areas that would be most expeditiously administered by tribal governments.

2. The executive branch provide for the delivery of services to off-reservation Indians consistent with the Federal obligation to all Indians. Accordingly, Congress recommend that the executive branch deliver appropriate services when feasible through urban Indian centers.

URBAN CENTERS

3. The executive branch provide financial support for Indian centers in urban areas. This could be expedited by turning over BIA Employment Assistance Offices and other Federal contracting opportunities to urban service centers; and delegating Federal domestic assistance dollars directly to urban centers on a fair per capita share basis.

4. The executive branch consider the placement of Federal funds targeted for urban Indians under an Urban Indian Office as a part of their considerations for the Consolidated Independent Indian Agency.

5. The Federal agency funding such urban center or centers determine the actual representation of such center or centers according to a process of membership certified to the agency.

EDUCATION

6. The executive branch mandate that urban centers receive:

Specific consideration for the receipt of Johnson-O'Malley funds;

Technical assistance and orientation in programing, budgeting, regulations, and funding programs;

Specific roles in program and policy formation in curriculum development for teaching and administrative staff hiring for schools with Indian children;

Funding for administrative and program costs.

HOUSING

8. The executive branch mandate that urban Indian centers be supported to provide:[30]

A real estate clearinghouse to provide information on available living quarters;

Consumer education programs in the areas of credit procedures, lease information, and general advice on moving from the reservation to an urban area;

Grants for initial moving costs, immediate support, rent supplements, housing improvements; and

The Bureau of Indian Affairs reestablish the program formerly funded providing equity grants for downpayments to urban Indians who have lived in the city for more than 2 years.

HEALTH

9. The executive branch mandate that appropriate action be taken to provide urban Indians with health care facilities by providing the urban Indian center with funds to:

Administer Indian health care programs;

Provide information for health care;

Contract for Indian health care;

Establish health educational programs;

Establish health care programs on its premises; and

Act as a monitor for funds designated for urban Indian health care.

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[30] These funds are presently provided to the Bureau of Indian Affairs for the same purpose.

CHAPTER TEN

TERMINATED INDIANS

The process of termination and the effects of the policy during the last 20 years are regarded in many quarters as disastrous. Literature and testimony gathered by the Commission are replete with individual and tribal stories of extreme hardship. Many observers have commented that termination transferred Indian people from a *de jure* trust relationship with the Federal Government to a *de facto* dependency on the public welfare system.

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CHAPTER TEN

TERMINATED INDIANS

INTRODUCTION

The Federal Government's most callous treatment of American Indians during this century flared during the 1950's and 1960's. At this time, there was an arrant attempt by the United States to disavow its responsibilities to approximately 100 tribes through legislation known as "termination policy." The process and effects of termination were so disastrous that the policy was discarded, but the period undermined Indian faith in the United States and fanned Indian suspicions and resentment of the Federal bureaucracy.

During this period of "termination policy," the United States essentially tried to diminish, and sometimes end, its special relationship to Indian tribes by shifting the financial cost to the public welfare systems of several States.

More than 11,500 Indian people and 1½ million acres of Indian land were affected. Termination became an open invitation to private enterprises to exploit the land and resources of 100 tribes. Public reaction against this policy and its effects finally impelled President Richard Nixon to remind Congress in 1970 that "the special relationship between Indian tribes and the Federal Government continues to carry immense moral and legal force." President Nixon concluded, "to terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American."

This short-lived policy, triggered by pressures of private "interests" seeking to acquire Indian lands, was initiated with little concern for the well-being of the affected tribes. The legislation implementing the policy was debated in perfunctory fashion. Termination was forced upon Indians who did not understand its purposes and could not predict its effects.

In retrospect, it is impossible to assign one reason for this era of Federal-Indian relations. Several explanations were offered at the time:

1. The notion that relatively well-off tribes did not need a special relationship to the United States Government.
2. The notion that the way to relieve poverty among Indians was to integrate them into American Society.
3. The mounting Indian and congressional disfavor concerning the operations of the Bureau of Indian Affairs.
4. Increasing concern over the undefined law and order jurisdiction on or near Indian reservations.
5. The desire of non-Indian interests to obtain commercially valuable tribal lands.

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6. The desire of the Federal Government to shift its service "burden" to the States, a part of the drive to reduce "big government."

Technically, termination refers to 13 legislative acts which established authorization procedures for cessation of the Federal-Indian relationship with respect to particular tribes. Most of these tribes were relatively small. For example, 37 California rancherias had an average of 30 members. Not all tribes scheduled for termination were actually terminated. A serious question currently exists whether termination of the rancherias was carried out legally. If not, substantial legal liability rests with the United States. But there were several large tribes terminated; the Menominee for example, had more than 3,000 persons and owned 233,000 acres of land.

Termination, as Federal policy, has been officially rejected. One tribe has been restored. But a number of terminated tribes remain as dramatic witnesses to the slowness of current policies of self-determination.

A DECADE OF BITTER CONTROVERSY

For a proper understanding of termination,[1] it is essential to view it historically in the context of Indian policy, not as an isolated aberration. Similarly, termination should not be analyzed merely as a series of separate acts altering the status of specific tribes or groups of Indians. Rather, it was a planned and comprehensively carried out national policy, interweaving various Bureau of Indian Affairs policies and congressional actions. The total termination program included: Assumptions of State civil and criminal jurisdiction over Indians under Public Law 83–280; elimination of laws applicable only to Indians; relocation to the cities; transfer of responsibilities for education from the tribes and the Federal Government to the States; various specific legislative withdrawals of Federal reponsibility. Viewed from this perspective, termination amounted to a fundamental social restructuring never witnessed before or since in Federal-Indian policy.

Termination, a term with emotional overtones,[2] precipitated a decade of bitter controversy in the field of Indian affairs. It was denounced by some as vicious racist [3] while championed by others as the flowering of democracy and justice.[4]

In large part, the termination era, derived its strength from the century-old desire to "assimilate" Indians. The political development of a Federal policy of assimilation was twofold. First, and most important, there was unrelenting pressure from homesteaders, railroads, ranchers, power companies and other acquisitive Americans. These interests agitated for the removal of restrictions on occupancy of Indian lands. Second, there was a feeling of generosity or obligation to the Indians, inspired by moral and ethical values—or guilt—to help them obtain the presumed benefits of non-Indian civilization. (Various components of this philosophy, such as the Allotment Acts and the use of education as a policy tool, have been traced in other chapters of this report.[5])

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[1] An excellent and concise description of the passage of the termination legislation and the history preceding it (from which much of this section is extracted) is contained in AIPRC Task Force No. 10, final report, 1976, by task force consultant Charles Wilkinson, entitled "The Passage of the Termination Legislation", p. 1627; *also see* Gary Orfield, "A Study of the Termination Policy", Denver, multilithed by National Congress of American Indians (no date).

[2] "Termination", with its ominous tone of finality, apparently developed as an alternative to the even more sinister-sounding term, "liquidation". *See* hearings on S. 1222, note 64, *infra*. When "termination" gained exclusive currency in official circles, it was often exchanged for the former expression by Indians and others, despite Bureau protestations that the two terms were not the same. A similarly unfortunate use of terminology was the name given to the relocation program. Notes 75–86 and accompanying text, *infra*. *See* R. Burnette, The Road to Wounded Knee, 17 (1974) (hereinafter cited as Burnette).

[3] Id., at 16–17. *See* generally, Cohen, "The Erosion of Indian Rights," 1950–1953: "A Case Study in Bureaucracy," 62 Yale L.J. 348 (19593) (hereinafter cited as Cohen, "Erosion of Indian Rights).

[4] *See*, e.g., Watkins, Termination of Federal Supervision of Indians, 311 "Annals of the American Academy of Political and Social Science", 47 (1957) (hereinafter cited as Watkins).

Assimilation Counterproductive

The culture of one people cannot be legislated by another. The reservation system was postulated as the modern alternative to complete assimilation, but clearly produced strong feelings of dependency and helplessness among Indians. Assimilation had seemed a simple and humane expedient to its supporters. But assimilation policies led to negative results for Indians, including the loss of tribal lands, the frustration of Indian self-realization and the reinforcement of Indian alienation. That it produced dire consequences for Federal policy was also undeniable. In spite of the fact that the policy was based on "good" intentions, it failed because it did not account for Indians' intentions.

This policy problem resulted because non-Indian society, even those people who were "sensitive" to Indian issues, did not understand or could not face the genuine causes of Indian deprivation. Many viewed the persistent poverty prevalent on reservations as an indication of the reservation system's inadequacy. They construed the special legal status of the Indians, which the reservations represented, as manifestations of poor Federal policy. The fact that reservations were often Indian homelands they had reserved to themselves was often overlooked, as was the history of the development of Indian rights. By the 1950's the special Federal-Indian relationship was viewed as the obstacle to Indian advancement, not as a means for advancement. The Bureau of Indian Affairs was similarly seen, by that time, as simply another useless and wasteful Federal agency.

Suprisingly, support for assimilation continued through a period of Federal support of tribal self-determination. The Indian Reorganization Act of 1934 has been viewed as a major turning point in Federal-Indian relations. It did, indeed, halt some of the more pervasive components of assimilation, such as allotment. The IRA, however, was not a total rejection of the assimilation doctrine, but rather a modification of it. In fact, its supporters defended the IRA on the basis of assimilation, saying its purpose was "to assimilate the Indian by letting him use his own culture as a springboard for integration."[6] After

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[5] *See* chapters 1, 4, and 8.

[6] W. Brophy and S. Aberle, The Indians, America's Unfinished Business, 182 (1966). *See* report of the Committee on Indian Affairs to the Commission on Organization of the Executive Branch of the Government, 72–72 (mimeographed, Oct. 1948), in Tyler, "Work Paper," at 21–22, n. 36 and Tyler, "History," at 152–153, n. 2; *see also*, C. Wesley, "Tribal Self-Government Under IRA," in Kelly, "Twenty Year Record," at 28. See also, "Commission on the Rights, Liberties and Responsibilities of the American Indian, A Program for Indian Citizens" (January 1961):

"While the six termination laws enacted in 1954 emphasized their purpose of ending Federal supervision over Indian property and terminating the services furnished Indians by the U.S. because they are Indians, they, in fact, abolished the home-rule governments of the Klamath, Menominee, Paiute, and other tribes, forced the sale of large amounts of land, including forest areas, of the Klamath Tribe, and made both tribal and allotted trust land taxable by the states."

Word War II, the IRA came under heavy fire as "communistic" and "antireligionistic," so cultural assimilation by tribal self-determination was soon dropped from Federal-Indian policy directions.

CONGRESS CRITICAL OF BIA

Both Houses of Congress conducted critical investigations of Indian Affairs in the late 1920's through the '40's. They were extremely critical of the administrative cost of the BIA and its slow progress toward achieving assimilation. In 1947 the Commissioner of Indian Affairs was ordered by the Senate to enumerate ways to eliminate BIA services in an effort to reduce the Federal bureaucracy, generally.

The Commissioner listed four criteria for Congress to consider in halting BIA services to tribes: (1) Degree of acculturation; (2) economic resources and conditions of tribes; (3) willingness of the tribe to be relieved of Federal control; and (4) willingness of the State to assume jurisdiction.[7]

Those criteria later were used as indicators of tribal readiness for assimilation. By the late 1940's, congressional pressure forced the BIA to begin developing programs oriented to the "eventual discharge of Federal Government's obligation." In the 1947 legislative session, 133 private bills were introduced to direct the issuance of fee patents on individual trust. Thirteen other bills were introduced to provide for Indian "emancipation" and the liquidation of tribal trust property. All of these actions shared a common impulse to relieve the Federal Treasury of the mounting costs of government. The cost of administering Indian affairs, although miniscule in relation to other activities of government, invited drastic budget and program reductions since Indians generally lacked political influence. As it turned out, however, Indians were not willing to see their living conditions reduced below the low level they had already reached. Tribes like the Klamath and the Menominee, although relatively rich in resources, opposed the idea of seeing the abrogation of their treaty guarantees against further alienation of their resources. The response to this often-expressed Indian resistance was increased congressional insistence on termination, led by Senator Watkins of Utah.

The Hoover Commission's Report on Indian Affairs[8] in 1949 blithely recommended "complete integration" of Indians "into the mass of the population as full taxpaying citizens."

In 1951, Dillon Myer, then BIA Commissioner, vigorously pursued the Hoover Commission's direction and defined the agency's goals as: (1) Improvement of Indian standards of living and (2) "Step by step transfer of Indian bureau functions" away from the Bureau. These objectives were to be accomplished through "citizenship participation" by individual Indians and "redefinition of the status" of Indians by termination of the Federal trusteeship and of tribalism itself. It was envisioned that the BIA would induce the "cooperation of persons of Indian descent" in "the present day economic development of this country."[9]

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[7] Hearings on S. Res. 41 before the Senate Committee on Civil Service, 80th Cong., 1st sess., at 544–45.

[8] Commission on Organization of the Executive Branch of Government, Indian Affairs, a report to Congress (Mar. 1949).

[9] 1951 Commissioner of Indian Affairs Annual Report at 353.

The capstone of the termination policy was House Concurrent Resolution 108,[10] declaring termination the official congressional policy. Certain tribes were singled out in the resolution for immediate termination. In 9 subsequent years, 13 additional termination statutes were enacted. These actions were not, as noted, isolated phenomena but had their roots in the idea that Indians could be coerced to assimilate into the mainstream of non-Indian society and Indian lands could be released for sale to non-Indians. This policy did not always arise from selfish motives; it was often defended in the name of "freedom" for the American Indian.

SPECIFIC TRIBES AFFECTED

The following chart indicates in chronological order the various termination acts, groups affected and effective dates of termination:[11]

Group	Number	Acres	State	Authorizing statute (date)	Effective date
Menominee	3,270	233,881	Wisconsin	68 Stat. 250 (1954)	1961
Klamath	2,133	862,662	Oregon	68 Stat. 718 (1954)	1961
Western Oregon [1]	2,081	2,158	do	68 Stat. 724 (1954)	1956
Alabama-Coushatta	450	3,200	Texas	68 Stat. 768 (1954)	1955
Mixed-blood Utes	490	211,430	Utah	68 Stat. 868 (1954)	1961
Southern Paiute	232	42,839	do	68 Stat. 1099 (1954)	1957
Lower Lake rancheria	(2)	140	California	70 Stat. 58 (1954)	1956
Wyandotte	984	94	Oklahoma	70 Stat. 893 (1956)	1959
Peoria	466	0	do	70 Stat. 937 (1956)	1959
Ottawa	630	0	do	70 Stat. 963 (1956)	1959
Coyote Valley rancheria	(2)	100	California	71 Stat. 283 (1957)	1957
California Rancheria Act [3]	1,107	4,317	do	72 Stat. 619 (1958)	1961-70
Catawba	631	834	South Carolina	73 Stat. 592 (1959)	1962
Ponca	422	834	Nebraska	76 Stat. 429 (1962)	1966

[1] 61 tribes and bands; figures listed are aggregates.
[2] Unknown.
[3] 37 to 38 rancherias; figures listed are aggregates.

A Unique Relationship Ended

Although there were differences in the various Termination Acts, the policy had a similar impact on a number of tribes. First of all, land was generally removed from trust and often sold and assets were distributed to tribal members. Termination did not affect certain treaty-based rights such as hunting and fishing. But for the most part, the "special" and "unique" relationship between the tribes and the United States was ended. Tribal members were subject to all state laws and were ineligible for Federal "Indian" services. The wise policies which had been developed in Indian affairs over 2 centuries and which recognized the special nature of Indian problems were negated by termination policy, in the selected situations where termination was carried out.

The process of termination and the effects of the policy during the last 20 years are regarded in many quarters as disastrous. Literature and testimony gathered by the Commission are replete with individual and tribal stories of extreme hardship.[12] Many observers have commented that termination transferred Indian people from a *de jure* trust relationship with the Federal Government to a *de facto* dependency on the public welfare system.[13]

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[10] H. Con. Res. 108, 83d Cong., 1st sess., 1953.

[11] AIPRC report of Task Force on Terminated and Non-Federally Recognized Indians, at 1640.

[12] *See, e.g.*, *Menominee Tribe* v. *U.S.*, 391 U.S. 404 (1968) and *Kimball* v. *Callahan*, 493 F. 2d 564 (9th Ar. 1974), *cert. denied*, 19 U.S. 1019 (1974).

The Commission's Task Force on Terminated and Non-Federally Recognized Indians reported tribal members did not fully understand the implications of termination and that oppressive tactics were utilized by the BIA to secure tribal consent for termination. Substantial questions—and litigation—have been raised concerning the management of the economic assets of the affected tribes, particularly the Klamath Tribe.

A significant issue has been raised whether termination legally occurred for several California rancherias because of the Federal Government's failure to follow statutorily mandated procedures. Although there is some opinion to the effect that such statutory noncompliance does not invalidate termination in particular situations,[14] the dominant view and the proper legal interpretation is that such noncompliance invalidates termination and that allegedly terminated Indians are actually still eligible for "special" Indian services.[15]

This question of noncompliance with statutory procedures raises additional legal issues, including the potential liability of the United States for unlawful termination and potential court action to set aside termination in particular cases. It was the opinion of Reid Chambers, then the Associate Solicitor, Division of Indian Affairs, that such suits "will almost surely succeed." [16]

FEDERAL GOVERNMENT REPUDIATES TERMINATION

Apart from the factual, human, and legal impacts of termination, any of which are sufficient grounds to repudiate that era in Federal-Indian relations, there is another overriding rationale for rejecting termination and its antecedent philosophy of assimilation: Such policies are in direct conflict with the rights of Indian tribes to survive as distinct culture and political communities.

The Federal Government has gone far in the last decade to repudiate termination. Congress restored the Menominee Tribe in 1973 [17] and passed the Indian Self-Determination and Education Assistance Act in 1975.[18] Both Acts are regarded as rejections of termination philosophy.

In 1970, President Richard Nixon, affirming a trend that began in the previous administration, announced that official Federal policy would be Indian self-determination. The reasons for rejecting termination are particularly pertinent: [19]

> This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal Government has taken on a trusteeship responsibility for Indian

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[13] Martone, F. "American Indian Government in the Federal System, Inherent Right or Congressional License," 51 Notre Dame Lawyer, 600, 616 (1976).

[14] Memorandum of Apr. 15, 1976, from Regional Solicitor, Sacramento (Department of the Interior) to Antis Herge, Special Assistant to the Solicitor, "Recommendations re June 25, 1975 Memorandum concerning Rancheria Act."

[15] Memorandum of August 25, 1976, from Associate Solicitor, Division of Indian Affairs to Solicitor, Dept. of the Interior, "California Rancheria Act."

[16] *Ibid.*, at 22.

[17] 25 U.S.C. sec. 903 (supp. 1975).

[18] Public Law 93–638, 88 Stat. 2203 (1975).

[19] President Nixon's July 8, 1970, message to Congress, H. Doc. No. 91–363, 91st Cong., 2d sess.

> communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal Government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our Government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the Government has agreed to provide community services such as health, education, and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.
>
> This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal Government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.
>
> The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State, and local assistance efforts. Their economic and social conditions has often been worse after termination than it was before.
>
> The third argument I would make against forced termination concerns the effect it has had upon the overwhelming majority of tribes which still enjoy a special relationship with the Federal Government. The very threat that this relationship may someday be ended has created a great deal of apprehension among Indian groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step might result in greater social, economic, or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the Federal Government will disavow its responsibility and cut them adrift.

Termination policy was poorly conceived and poorly executed. The disastrous effects it caused cannot be denied, and the Federal Government was itself surprisingly quick to realize that the policy had been a mistake. The Commission applauds current policies which repudiate termination, and advises that termination must never again be forced on Indian tribes. Repudiation of this policy, however, must be accompanied by restoration of the status of the many tribes which were adversely affected by termination.

RECOMMENDATIONS

The Commission recommends that:

1. Congress by joint resolution specifically repudiate H. Con. Res. 108 and the policies of assimilation and termination that it represents, and commit Federal-Indian policy specifically to Indian self-determination.

2. Congress provide appropriate legislation for an administrative restoration process adhering to the following principles.[20]

   a. Purpose of the Act: To establish standards and procedures by which terminated Indian tribes may be restored to the status of sovereign, federally recognized Indian tribes; to restore to terminated Indian tribes and tribal members those Federal rights, privileges, and services to which federally recognized Indian tribes and their members are entitled.

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[20] *See*, AIPRC, report of the Task Force on Terminated and Non-Federally Recognized Indians, at 1705 for suggested legislation adhering to these principles.

b. The policy of termination was wrong and Congress expressely recognizes that fact. All reasonable steps be taken to fully and quickly restore Federal recognition to terminated tribes, reestablish their land base, and restore tribal sovereignty. All Federal moneys expended pursuant to the Act be over and above existing appropriations for Indian affairs.

c. Any terminated tribe may file a "petition for restoration" with the Secretary of the Interior. The Secretary shall grant the petion where: (1) the tribe is maintaining a tribal identity, and (2) restoration is favored by a majority of the tribal members actually voting in an election. The Secretary shall liberally construe the petition in favor of the tribe and any denials of petition shall be without prejudice to the tribe's right to refile subsequent petitions. If a petition is granted, the Secretary and the tribe shall negotiate a restoration plan, the tribe will be eligible for all Federal services and benefits, and all rights of the tribe under Federal treaty, statute, executive order, agreement, or otherwise shall be reinstated.

d. The restoration plan provide for election of an interim tribal council, adoption of a tribal constitution and bylaws, revision of the tribal roll, establishment of reservation land in trust, and other specifics. Congress retains the power to approve or disapprove any restoration plan.

e. Nothing in the Act alters preexisting rights or obligations or affects the status of any federally recognized tribe.

f. The Act be construed in favor of Indians; the Secretary of Interior shall cooperate with tribes seeking restoration; his action is subject to review by a Federal court; and other specifics.

g. Authorization for whatever appropriations are necessary to implement the Act.

h. The Secretary of Interior is authorized to adopt regulations necessary for carrying out the Act.

3. Congress, as an interim measure, recognizing the hardships caused by terminations, by legislation specifically extends appropriate Federal-Indian services to "terminated" Indians.

Addendum: The Restoration Process as Proposed by Task Force Ten

The Restoration Act provides the following steps which a terminated tribe would be required to take in order to achieve restoration:

(1) The tribe files a short and simple petition with the Secretary requesting restoration (sec. 3(a)). The petition must be signed under oath by some representative group of the tribe.

(2) Within 10 days the Secretary, construing the petition in favor of the tribe, must determine whether the petition is legally sufficient on its face (sec. 3(c)(1)). If the petition is insufficient on its face, the petition is denied but the tribe can refile at any time.

(3) If the Secretary finds that the petition is sufficient he must conduct an election pursuant to sec. 3(c)(2)). The election must be called within 15 days and held within 60 days after the ruling on the petition. The purposes of the election are: (1) to determine

whether a majority of tribal members actually voting in the election are in favor of restoration and (2) to choose the members of the interim tribal council which will represent the tribe during the restoration process. The election procedure in sec. 3(c)(2) is informal and gives the Secretary substantial leeway. Any tribal member 18 years or older may vote. This includes people born after termination (see definition of tribal member, sec. 2(c)). It should be noted that the selection of the interim tribal council by election at an early date will serve to avoid claims of legitimacy by opposing tribal groups.

(4) If the tribe does not vote in favor of restoration, the petition is denied although the tribe can refile after 6 months (sec. 3(c)(3)).

(5) If the tribe votes in favor of restoration, the tribe has met one of the two standards for restoration (sec. 3(b)) and the Secretary will then proceed to determine whether the tribe meets the second standard, i.e., maintaining a tribal entity. The definition of tribal identity is broad (sec. 2(d)) and will probably be met by most tribes. The inquiry must be completed within 60 days after the election.

(6) If the Secretary finds that the tribe is not maintaining a tribal entity the petition will be denied and the tribe can refile after 6 months (sec. 3(c)(5)).

(7) If the Secretary finds that the tribe is maintaining a tribal identity, the Secretary must grant the petition for restoring (sec. 3(c)(6)). Under (sec. 3(d)) the granting of the petition has these immediate effects. First, the Secretary and the tribe will proceed to negotiate the restoration plan under sec. 4; that procedure will be discussed below. Second, the tribe and its members (including members born after the date of termination (sec. 2(e)) will be entitled to Federal benefits. Third, all rights under treaties statutes, Executive orders, and agreements will be immediately reinstated. This provision is probably the most controversial aspect of this act. Although the Menominee Tribe had all of its treaty rights reinstated, hunting and fishing interests will vigorously oppose this aspect of the proposed act. The section is included in this form because of the precedent in the Menominee Restoration Act; the section could be changed to provide that certain treaty rights, such as hunting and fishing rights, will not be affected in any manner by granting of restoration. Fourth, the interim tribal council, which will represent the tribe during the restoration process, will take office (sec. 3(d)(4)).

The interim tribal council will have the powers of tribal councils of federally-recognized Indian tribes except that it will be replaced when the constitution and bylaws go into effect; in addition, the interim tribal council cannot bind the tribe for a period of more than 6 months after the end of its tenure.

(8) The Secretary will then proceed to negotiate a restoration plan with the interim tribal council under (sec. 4.) The matters to be contained in the restoration plan are set out clearly in the act. One important, and possibly controversial, point is that (sec. 4(a)(6)) permits the tribe to make its own decision on the ap-

plicability of the Indian Reorganization Act and Public Law 83–280.

(9) The restoration plan must be negotiated and submitted to Congress within 6 months after the granting of the petition for restoration (sec. 4(a)).

(10) The plan will go into effect within 2 months after submission of the plan to Congress unless either House rejects the plan (sec. 4(d)).

(11) The next job is to implement the restoration plan, including adoption of constitution and bylaws, preparation of a tribal roll, and establishment of a reservation. There are no time limits for the completion of the implementation of the restoration plan although the plan must be completed "as early as practicable" (sec. 4(b)). The lack of specific dates is due to the fact that circumstances will vary widely among the different tribes.

CHAPTER ELEVEN

NONRECOGNIZED TRIBES

Inconsistencies and oversights in the Indian policy of the United States are exposed by one stark statistic: there are more than 400 tribes within the Nation's boundaries and the Bureau of Indian Affairs services only 289. In excess of 100,000 Indians, members of "unrecognized" tribes, are excluded from the protection and privileges of the Federal-Indian relationship.

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CHAPTER ELEVEN

NONRECOGNIZED TRIBES

INTRODUCTION

Inconsistencies and oversights in the Indian policy of the United States are exposed by one stark statistic: There are more than 400 tribes within the Nation's boundaries and the Bureau of Indian Affairs services only 289.[1] In excess of 100,000 Indians, members of "unrecognized" tribes, are excluded from the protection and privileges of the Federal-Indian relationship.[1a]

There is no legal basis for withholding general services from Indians, with the sole exception of specific termination acts. There is no legitimate foundation for denying Indian identification to any tribe or community. The BIA has no authority to refuse services to any member of the Indian population.

Many unrecognized tribes have land title problems and are enmeshed in jurisdictional questions. They are severely handicapped by poor health, lack of educational opportunities and economic difficulties, yet they receive no assistance from the Federal Government. Nearby State and county officials are confused by the nebulous political status of these tribes.

The inequitable administration of Federal programs and laws stems, in large measure, from the accidents and vagaries of history. Nonrecognition is incomprehensible to Indians who have been neglected and forgotten. There is no valid reason for it. Long-deferred justice can be given to abandoned tribes only by a congressional declaration stating that all Indian people are included in the Federal trust responsibility and the anomalous term, "nonrecognized", is as obsolete as the circumstances that led to its invention.

At the root of this problem is the identification of the rights of all Indian peoples to Federal Indian programs, laws, and protections. Since this process of identification has been inconsistent, a number of Indian people have been denied services either because they are not identified as "Indians" or as "tribes" as the terms are used in United States policy and law. To dispel this problem, and to direct the Federal-Indian policy to all Indian peoples, the term "Indian tribe" is defined by any one of a series of definitional factors enumerated in the recommendations which follow, and is intended to apply to all Indian peoples, including Indian communities, bands, clans, societies, alliances and groups, whether amalgamations or fragmentations of Indian tribes; but its use in this chapter is not meant to divide any

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[1] Figures ascertained by calling the BIA, and by adding the number of known unrecognized communities. From the chart compiled by David Harmon and Suzanne Ahn of the American Indian Policy Review Commission staff.

[1a] See the chart of nonrecognized tribes on p. 468.

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presently recognized tribal entities, or to apply to any people who are already formally recognized as part of a tribe by the United States Government for purposes of Federal Indian law or programs.

MURKY PRECEDENTS, QUIRKY ADMINISTRATION

Trying to find a pattern for the administrative determination of a federally recognized Indian tribe is an exercise in futility. There is no reasonable explanation for the exclusion of more than 100 tribes from the Federal trust responsibility.

The distinction the Department of the Interior draws between the status of recognized and unrecognized tribes seems to be based merely on precedent—whether at some point in a tribe's history it established a formal political relationship with the Government of the United States. The procedure was subject to an accident of history. A number of Indian tribes are seeking to formalize relationships with the United States today but there is no available process for such actions.

The special Federal-Indian relationship usually was established by treaties. There are tribes, however, which have no treaties and receive services from the BIA; and there are tribes which signed treaties but do not receive services. Now, as pointed out earlier, the United States no longer negotiates treaties with Indian tribes.

Congressional measures mentioning a specific tribe often are used as a basis for a tribe's special relationship with the U.S. Government, but there are tribes mentioned in legislation that receive no Federal attention. And there are tribes which never were mentioned in legislation that receive services.

Administrative actions by Federal officials and occasionally by military officers sometimes have, at other times, laid the foundation for Federal acknowledgment of a tribe's rights. Yet, some tribes attracted temporary attention and later were ignored while others simply drew no attention.

INDEFENSIBLE BUREAUCRATIC DECISIONS

The Bureau of Indian Affairs has no clear authority to deny services to any tribe and never has rationalized its vague policy of excluding a particular tribe. Most legislation affecting Indian policy and law is directed to Indians generally, addressing the general historical situation inherent in Federal-Indian relations. Congress' intent often has been to seek solutions to the problems confronting all Indians. Except in the specific, well-defined cases of terminated tribes, there is no foundation for the executive branch's refusal to serve any tribe.[2]

There is no question that Federal programs and laws are applied inequitably among Indians tribes. The Department of the Interior has enforced these laws only in selected Indian communities without justifying its process of selection.

TURMOIL IN INDIAN COMMUNITIES

Poorly defined administrative discretionary practices have resulted in widespread confusion affecting the lives of Indians and other citizens throughout the United States. A number of Indian and non-Indian communities are troubled by unclear land titles because Indians who may own the land are not recognized as Indians by Federal officials.

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[2] Task Force Ten final report, p. 1696. See also Thomas N. Tureen, "Federal Recognition and the Passamaquoddy Decision", in Task Force Ten's report, pp. 1653–74.

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In many areas, tribes arguing jurisdiction over their members and their land have won or lost solely at the discretion of local governmental representatives.

Withholding of recognition has led to bizarre social consequences. There were incidents when Indians speaking their tribal languages were committed to mental institutions because their neighbors, who did not acknowledge their Indian identity, thought they were having "fits."[3] In Louisiana, marriages by tribal custom were not recognized as legitimate on the grounds that the Federal Government did not recognize the tribes themselves.[4] A more widespread occurrence is that Indians asserting their tribal identity are accused by non-Indian neighbors of being imposters.[5]

Task Force Ten summed up the impact of this confusion on Indian communities:

> The results of "nonrecognition" upon Indian communities and individuals have been devastating, and highly similar to the results of termination. The continued erosion of tribal lands, or the complete loss thereof; the deterioration of cohesive, effective tribal governments and social organizations; and the elimination of special Federal services, through the continued denial of such services which Indian communities in general appear to need desperately. Further, the Indians are uniformly perplexed by the current usage of "Federal recognition" and cannot understand why the Federal Government has continually ignored their existence as Indians. Characteristically, Indians have viewed their lack of recognition as Indians by the Federal Government in utter disbelief and complete dismay and feel the classification as "nonfederally recognized" is both degrading and wholly unjustified.[6]

ACCIDENTS OF HISTORY

Stated administrative refusal to recognize certain tribes is a relatively recent phenomenon that gained some support during the years Congress sought to terminate the Federal relationship with specific tribes. The BIA appears to have believed that since termination was the new policy Congress would not want to acknowledge the special relationship to other tribes. The neglect of certain tribes, however, has deeper roots than termination policy. It often is the result of long-forgotten historical accidents.

While the United States was expanding across the North American continent, it was confronted by a formidable task. It was necessary to incorporate or resolve the policies and legal traditions of the colonial governments of France, Spain, Mexico, and Russia in addition to the English systems which were fundamental to early federal development.

In accepting jurisdiction over former colonial territories, American officials had difficulty collecting, translating, and resolving the agreements former powers had made with Indian tribes. Many tribes which were well-known participants in colonial affairs were unfamiliar to the United States. Some tribes were so weakened by colonial governments that they were overlooked. Other tribes avoided contact with colonial governments and the United States. A brief discussion of this period provides an understanding of the complications in this hidden side of American Indian history.[7]

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[3] Interdiction papers from the Avoyelles Parish Court House, Marksville, La. The cases involved two members of the Ofo Tribe, whose language is now extinct.

[4] *Sesostrie Youchicant* v. *Texas and Pacific Railway Co.* La. 22808.

[5] *See* Task Force Ten report, sections submitted by tribes.

[6] Task Force Ten report, p. 1695.

In the 13 original colonies, some tribes supported England in the War for Independence and were regarded as enemies by Americans. They were treated with disfavor, encouraged to leave the country, and were forgotten in subsequent years.[8]

COLONIALISM HARSH ON INDIANS

Conversely, in the southeastern and Appalachian regions, where England had competed with France and Spain for control, Indian enemies of England were regarded as enemies of the United States. They were subjugated and ignored.[9]

The Louisana Purchase from France guaranteed that Indian treaties with former powers would be honored by the United States. Those treaties were ignored and the tribes were forgotten.[10]

In the Floridas, which the United States and Spain contested until 1819, Indians who were allies of Spain lost much of their lands, fled to isolated areas and hid from the advancing Americans.[11]

Mexico's agreements with the tribes of Texas, and the liberal Indian policy which later was administered by the Republic of Texas, were largely forgotten after Texas joined the Union. Many tribes in Texas were ignored after statehood.[12]

Along the northern borders of Michigan, Minnesota, North Dakota, and Montana, some tribes moved freely between American territory and Canadian provinces. Both countries left the responsibility for dealing with those tribes to the other government.[13]

In the southwest, Indian pueblos which had existed independently from time immemorial and were recognized as self-governing entities by Spain and Mexico, were ceded to the United States along with surrounding territory. They were ignored by Federal Indian policy for half-a-century, and some have not been recognized yet as pueblos.[14]

In California, a similar situation developed with the Spanish-organized Indian rancherias. They were absorbed by the United States with no clarification of their Indian status.[15]

In the Pacific Northwest, tribes which had balanced the competing interests of England, Russia, and Spain for centuries, lost the achievements of generations of tribal diplomats when the United States established control of the region. The Americans found little use for native alliances and ignored a number of tribes.[16]

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[7] Much of the following section evolved from "Those Whom Even Time Forgot", ch. 12 of Kirke K. Kickingbird and Karen Ducheneaux, "100 Million Acres" (Macmillan, New York, 1973), 196–210.

[8] *See* New England tribal histories in Task Force Ten report, 71–130.

[9] Ernest C. Downs, "The Struggle of the Louisiana Tunica Indians For Recognition," a chapter to be published in Walter L. Williams, "Southeastern Indians Since the Removal Period."

[10] *See* Carol J. Meyer, Jr., "The Louisiana Purchase and Indian Rights," in the American Indian Journal, October 1976.

[11] Kickingbird and Ducheneaux, *op. cit.*, 208.

[12] E.g., the Tiguas and Alabama-Coushatta groups; speech of Vine V. Deloria, before a conference of Anthropologists and Indian People in Alexandria, La., January 1973.

[13] Kickingbird and Ducheneaux, *op. cit.*, 203–205.

[14] *See* Task Force Ten's report on the Pascua-Yaqui, pp. 131–147.

[15] Task Force Ten report, introduction.

[16] *See* Warren Cook, "Floodtide of Empire" (Yale, 1976), *passim*.

Across the continent, there were tribes which quietly fled colonial settlements and which were completely forgotten by all governments administering the colonies.

Tribes seldom benefited from the colonial period. Those who participated in the colonial schemes of European nations suffered the misfortunes of their European allies without having the advantage of returning to a safe homeland. Many tribes who accustomed themselves to one colonial power had their worlds overturned later by a more formidable power.

Rights guaranteed by one European nation not always were protected by later colonizers. Tribes who refused to side with any invading power usually found themselves distrusted and unaided by all Europeans.

FEDERAL CONTINUATION OF COLONIAL OVERSIGHTS

Not all the tribes neglected by the United States in the last two centuries were forgotten because of historical accidents in colonial times. A number of tribes were lost as a direct result of Federal Indian policy.

Tribes "lost" after American independence avoided contact with Americans. Indians, who perceived that Federal policies would be harmful to their tribes, that government officials sought to divest them of their land or that Federal agents were corrupt, often decided to remain in hiding. These isolated tribes did not realize or did not believe that there were Federal laws designed to protect their lands and that some Federal programs might have given them needed services. Even when administrators of Indian programs attempted to ameliorate the conditions of tribes, it was likely that peaceful tribes which had not fought against the United States would be unknown and, consequently, overlooked.

Tribes willing to relate to Federal officials sometimes were lost due to bureaucratic oversight or the inept administration affecting them.[17]

In Massachusetts and other Eastern States, tribes which had survived British and American conflicts sometimes found themselves the object of concerted assimilation programs. Indians who resisted the policy achieved hidden independence in isolation. Others who became "Christian Indians" or "Praying Indians" were noted in BIA records but were treated as though they had ceased being "Indian."[18]

TRIBAL COMMUNITIES DISPERSED, LOST

The Removal Policy contributed to wide dispersion and loss of Indian tribal communities. The first removal treaties promised land west of the Mississippi River, but later treaties located "Indian Territory" hundreds of miles farther west. During the period between the two types of treaties, a number of Cherokee, Creek, and Choctaw towns had moved to the areas promised, unaware that new treaties had changed their official destinations. They settled in Arkansas and Louisiana believing they were fulfilling their part of the treaty.[19]

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[17] Kickingbird and Ducheneaux, *op. cit.*

[18] Task Force Ten report, 71–130.

[19] *See* Hiram F. Gregory, "The Jena Band of Louisiana Choctaw" in the "American Indian Journal," Feb., 1977.

Circumstances occasionally caused the accidental exclusion of tribes which would have participated in treaty negotiations with the United States. A day's delay, while an official traveled to the place appointed for the treaty, could result in a group's return home. Snowstorms in the Northwest prevented the attendance of tribes in some treaty proceedings.[20]

In many situations, bands of Indians who disagreed with the provisions of treaties walked out of the negotiations in protest. Years later they suffered because they had no treaty rights, however limited.[21]

Some policies implementing treaty provisions also contributed to tribal isolation. Forced relocation of tribes on reservations, for example, did not take runaways into account. In Arizona, one tribe that was relocated on a reservation with an unfriendly tribe simply returned to its original homeland without telling Federal officials.[22]

When Congress legislated the end of the treaty-making period in American Indian policy in 1871, one Federal official foresaw the problems for tribes that had not yet established relations with the Federal Government. In his 1872 report, the Commissioner of Indian Affairs made these comments:

> This action of Congress . . . presents questions of considerable interest and much difficulty, viz: What is to become of the rights of the Indians to the soil over portions of territory which had not been covered by treaties at the time Congress put an end to the treaty system? What substitute is to be provided for that system, with all its absurdities and abuses: How are Indians, never yet treated with, but having in every way as good and complete rights to portions of our territory as had the Cherokees, Creek, Choctaws, and Chickasaws, for instance, to the soil of Georgia, Alabama and Mississippi, to establish their rights?[23]

LANDLESS INDIANS

The Allotment policy, parceling out Indian lands to individuals, did not always provide for the tribe's total population. Landless Indians were forced to move off the reservation and regroup in neighboring towns or cities.[24]

The Indian Reorganization Act of 1934 tried to rectify a number of these situations. At that time, in fact, the word "recognized" was first applied to Indian tribal governments. Prior to passage of the IRA, the Bureau of Indian Affairs had seen tribes as being "under the jurisdiction of the Federal Government." [25] The Act proposed the purchase of land bases for some small tribes which had been previously unknown. World War II interfered with these plans, however, and the tribes were forgotten again.[26]

By the 1950's, interest in preserving the special status of Indian tribes had waned and in specific cases tribes were terminated. One Louisiana Congressman who sought Federal programs for five unrecognized tribes in his State received the following response from the BIA: "Current policy in Indian affairs is to promote the social and economic development of Indian tribal groups now under our jurisdiction so that, as rapidly as possible, they may become independent of their special relationship with the Federal Government."[27] From that time to the present, various reasons have been given for the BIA's reluctance to serve some tribes as it does others.

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[20] Ken Hansen; *see* Task Force Ten Report, pp. 181–191.

[21] Historical research conducted for *U.S. v. Washington*, unpublished.

[22] Kickingbird and Ducheneaux, 199–202.

[23] Report of the Commissioner of Indian Affairs for the year 1872; cited in Task Force One final report, p. 95.

[24] Kickingbird and Ducheneaux, 203–205.

[25] 24 U.S.C. 479.

[26] Kickingbird and Ducheneaux, *op. cit.*

AVAILABLE INFORMATION ON NONRECOGNIZED TRIBES

Since most of these tribes are in isolated locations and have never been served by the Federal Government under the denomination of "Indians", it is extremely difficult to collect information on them. In many cases, these tribes resist outside investigators asking for information. A few publications have appeared recently in defense of these tribes, but they often have relied on outdated information or vague estimates.

Despite these unavoidable difficulties, Commission staff members, have prepared a chart of known nonrecognized communities, their locations, populations, their colonial treaties and/or United States treaty rights, whether they have been mentioned in BIA records, what services they receive, and the services for which they have expressed a need.

The chart contains many gaps and shortcomings which cannot be corrected at this time without more accurate data. It is important, however, to use the chart to locate almost totally unknown tribes not referred to in any other single source. To summarize the findings in the chart, which is admittedly incomplete, these pertinent facts can be presented:

> There are approximately 133 nonrecognized Indian communities in the United States.
>
> Seventy-six communities have stated population figures. The total nonrecognized population appears from these estimates to be in excess of 111,728.
>
> There are at least 23 such Indian communities with land even though Federal officials do not protect that land by applying laws pertaining to Indian tribal lands.
>
> At least 37 communities have had formal treaty relationships with governmental powers that predated the United States.
>
> At least 29 communities have United States treaty rights derived either from obligations the United States assumed from colonial powers or from treaties the United States negotiated with these or other Indian tribes.
>
> At least 25 of these tribes have been mentioned in BIA records and, therefore, are familiar to the United States as tribes of Indians.
>
> Of the tribes receiving services, most get funds from a few Federal programs: CETA funds administered by the Department of Labor, Indian Education Act (title IV) funds administered by the U.S. Office of Education, and some ONAP programs.
>
> The most frequently expressed needs in these communities are education, health services, housing, land, and legal assistance.

[The chart follows.]

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[27] Letters kept by the Pierite family and the Barbry family of the Tunica Tribe, photocopied and filed at the Institute for the Development of Indian Law, Washington.

CHART OF AVAILABLE INFORMATION ON NONFEDERALLY RECOGNIZED INDIAN TRIBES

Name of tribal group and location	Number of members	Land base (acres)	Colonial Treaties	U.S. Treaty Rights	Mentioned in BIA records, reports, or publications	Services now receiving	Services desired	Information sources
ALABAMA								
Creek Nation East of the Mississippi: Atmore	[1] 545			Yes				(2)
Choctaw Communities: Washington and Mobile Counties	4,000							(2a)
ARIZONA								
Guadalupe, Inc. (Yaqui): Phoenix	[3] 550, [4] 1,500							(5)
Pascua Yaqui Association: Tucson	[6] 2,000, [7] 6,500	202	Yes	Yes	Yes [8]	Public Law 80-350, OEO, CETA.[9]	H, S.T., T, L.E.	(10)
CALIFORNIA								
American Indian Council of Mariposa County (Mono): Yosemite National Park.					Yes [12]			(12)
Big Meadows Lodge (Maidu, Miwok): Chester								(12)
Butte Valley Indian Council (Miwok): Durris								(12)
Calavaras County Band of Miwok Indians: West Point								(12)
Capistrano Indian Council: San Juan Capistrano								(12)
Central Coast Indian Council: Morro Bay								(12)
Happy Camp Karok Council: Happy Camp					Yes			(12)
Howonquet Community Association: Smith River								(12)
Indian Community of Mono Lake: Le Vining								(12)
Mendo Lake Pomo Council: Ukiah								(12)
Orleans Karok Council: Orleans								(12a)
Pit River Bands								(12)
Siskiyou County Indian Association (Shasta, Wintun, Karoks): Etna.								(12)
Sonoma County American Indian Council (Pomo): Heraldsburg.								(12)
Xabenapo Community Council: Finley								(12)
Jamul Dieguenо: Near San Diego	[14] 705	[20] 100						
CONNECTICUT								
Eastern Pequots (Paucatuck Pequots): New London	[15] 19	225	Yes,[16] 1683	Yes				(17)
Mohegan Tribe: Uncasville	[17] 200		Yes					(17)
Paugusett Tribe (Golden Hill Tribe): Trumball	[18] 50	0.26						(18)
Schaghticoke Indians of Kent, Conn., Inc.: Litchfield	[19] 400	400	Yes				H., L., E.A.	(20)
Western Pequots of Connecticut (Mashantucket Pequots): Ledyard.	55	212.9	Yes				H., R., S.T., L.	(21)

DELAWARE								
Nanticoke Tribe: Millsboro	[33] 411		Yes, 1644		Yes [30]	State school aid	Ag. Ass.	(34)
Moors: Kent County	310							(34)
FLORIDA								
Appalachicola Tribe: Carrabelle		Yes	Yes, 1678	Yes, 1823, 1832		Indian education grant.	Ed., F., L. Ass., Med.	(35)
Cow Creek Seminole	1,600							(35)
Lower Creek Tribe East of the Mississippi, Inc.: Pensacola.								(35)
Muskogee Creek Nation East of the Mississippi: Perry								(35)
GEORGIA								
Altamaha	100							(35)
Creek Tribe East of the Mississippi, Inc.: Cairo								(35)
Muskogee-Creek Tribe East of the Mississippi								(37)
United Etowah Cherokee Nation of Georgia	(96)							(35)
INDIANA								
Miami: Indianapolis	700							(35)
Miami: Peru	[34] 63, [29] 93		Yes, 1763					(35)
KANSAS								
Chippewa, Munsee, Delaware: 8 communities	69		Yes	Yes	Yes			(36)
Delawares, Inc				Yes [31]				(37)
Wyandot Community: Wyandot County	134			Yes [32]				(35)
KENTUCKY								
United Lenape Band and Adopted Tribal Peoples: Moorehead.								(35)
LOUISIANA								
(Atakapa), Attacapa: Gulf coast	6		Yes	Yes				(36)
Choctaw Band of Louisiana: Baton Rouge	[34] 2,500		Yes	Yes				(35)
Choctaw: Saint Tammany Parish	55		Yes	Yes	Yes			(35)
Choctaw: Rapides Parish	181	(96)	Yes	Yes	Yes			(35)
Houma Alliance, Inc.: Dulac	[33] 1,500	Yes	Yes, 1777	Yes	Yes [34]	CETA	H., T., L. Ass.	(37)
Houma Tribe, Inc.: Galliano	[38] 2,500	(97)	do	Yes	Yes [36]	CETA, HEW [38]	H., Ed., L. Ass.	(35)
Jena Choctaw Band: Jena, La Salle Parish	[40] 200	Yes	Yes	Yes	Yes	CETA, HUD	Ed., Med., H., L. Ass.	(41)
Tunica-Biloxi Tribe: Marksville	[33] 600	130	Yes, 1779	Yes	Yes	CETA	H., L. Ass. Ed., Med.	(42)

See footnotes at end of table.

CHART OF AVAILABLE INFORMATION ON NONFEDERALLY RECOGNIZED INDIAN TRIBES—Continued

Name of tribal group and location	Number of members	Land base (acres)	Colonial Treaties	U.S. Treaty Rights	Mentioned in BIA records, reports, or publications	Services now receiving	Services desired	Information sources
MAINE								
Association of Arrostock Indians (Micmac and Malecite): Houlton.	1,158		Yes, 1794				Med., H	(43)
Central Maine Indian Association: Orono								(33)
MARYLAND								
Lumbees: Baltimore	3,500							(43)
Nanticoke: Blue Ridge Mountains	[44] 700		Yes, 1698					(4)
Piscataway-Conoy Indians, Inc.: Oxon Hill			Yes, 1634 [47], 1642. [47]		Yes, 1941		Ed., L. (20 acres)	(28)
Wesorts (descendents of Piscataway-Conoy): Eastern Shore.								(46)
MASSACHUSETTS								
Algonquin Indian Association: Brockton								(35)
Boston Indian Council Services Wabenakis: Boston	3,500		Yes			CETA		(48)
Bristol County Indian Council: North Dartmouth								(28)
Freetown-Fall River Wampanoag: Freetown and Fall River		227.5	Yes, 1707. [49]					(30)
Hassanamisco-Nipmucs: Worcester County	300	11.9	Yes, 1728		Yes		L., H., Ed	(31)
Wampanoag Tribal Council of Gay Head, Inc.: Martha's Vineyard Island.	[50] 400	200	Yes, 1620, 1707. [49]		Yes		L., H	(38)
Mashpee Wampanoag Indian Tribal Council: Mashpee Barnstable, environs.	900	500	1707 [50]		Yes		L., L.Ass. H	(38)
New England Schagticoke Indian Association, Inc.: Avon								(37)
MICHIGAN								
Consolidated Bahweting Ojibwas: Sault-Ste, Marie				Yes [53]				(38)
Genesee Valley Indian Association: Flint								(4)
Gogebic-Ont. Non-Res. Indian Council: Bessemer								(28)
Grand Rapids Intertribal Council: Grand Rapids								(28)
Grand River Band of the Ottawa Nation: Hart								(25)
Huron Pottawatomie: Fulton	50	120		Yes, 1815, 1841, 1836. [54]				(36)
Katakitegoning Indian Community Council: Watersme et								(37)
Leelanau Indians, Inc.: Suttons Bay								(76)

Les Cheneaux Tribe, Inc.: Hessel							(28)
Native Americans of Macomb County: Mount Clemens							(28)
Northern Michigan Ottawa Association: Petoskey							(28)
Oakland County American Indians: Auburn Heights							(28)
Ocona Cap: Hart							(28)
Ojibway Indians: Iron River				Yes [56]			(28)
Ottawa and Chippewa Indians of Michigan: Schoolcraft, Mackinac, and Charlevoit Counties.	6,000			1867, 1872, yes.[57]			(58)
Pogaeon Potawatomi: Berien, Cass, Van Buren Counties.	637						(59)
Potawatomi Indian Nation, Inc.: Dowagiac							(28)
Potawatomi Indians of Michigan: Watervliet							(28)
Potawatomi: Horner and St. Joseph				Yes [60]			(61)
Saginaw Intertribal Association: Saginaw							(28)
Saginaw Valley Indian Association: Pinconning							(28)
Thornapple Band of Ottawas: Manistee							(28)
Tri-County American Indians: Sault-Ste, Marie							(28)
MISSISSIPPI							
Various Choctaw and Creek Communities: Scattered	1,908						(62)
MONTANA							
Chartered Landless Indians (Chippewa and Cree): Missoula.	2,200 (62a) 1,500						(28)
Metis: Scattered							(63)
NEW HAMPSHIRE							
New Hampshire Indian Council (Pennacook): Manchester	361						(64)
NEW JERSEY							
Jackson Whites and Pineys: Gouldtown	1,300						(64a)
Lenni Lenape							(64b)
Powhatan Indians of Delware Valley: Camden							(28)
NEW YORK							
Abnaki/Wabanakis: Lake George	25						(65)
Indian Mountain Look-Out Inter-Tribal Native Americans: Otisville.							(28)
Montauk: Long Island	50		Yes				(66)
Poospatuck Indian Tribe: Long Island	85	60	Yes			H., E. A.	(67)
Shinnecock Tribe: Southampton	200	600	Yes		New York services	H., Ed., L. Ass.	(68)
Bushwacker	100						(68a)
Jackson Whites	500						(68a)

Footnotes at end of table.

CHART OF AVAILABLE INFORMATION ON NONFEDERALLY RECOGNIZED INDIAN TRIBES—Continued

Name of tribal group and location	Number of members	Land base (acres)	Colonial Treaties	U.S. Treaty Rights	Mentioned in BIA records, reports, or publications	Services now receiving	Services desired	Information sources
NORTH CAROLINA								
Chadbourne Area Association of Indians								(27)
Coharie Tribe: Clinton	1,775						Ed	(69)
Cumberland County Association for Indian People: Fayetteville.	3,199						Ed	(70)
Eastern Carolina Indian Association: Robeson County	1,500				Yes		Ed., L. Ass.	(71)
Haliwa Indian Tribe, Inc.: Halifax, Warren County	2,500		Yes				Ed., H., S. T.	(72)
Lumbee Indians: Robeson County and environs	[73] 31,000 [74] 40,000		Yes, 1584		Yes		Ed., H., etc.	(75)
Person County Indians: Person County	333							(76)
Smilings Siouan	4,000							(77)
Tuscarora Eastern Carolina Indian Organization: Maxton								(78)
Waccamaw Siouan: Boulton	2,000	5						(79)
OHIO								
Cherokee Nation United Remnant Band: South Point								(25)
Tecumseh Confederacy: Xenia	500					CETA	L.	(80)
OREGON								
Chinook Tribe of Indians (Tchinook): Mouth of the Columbia River.								(26)
PENNSYLVANIA								
Council of Three Rivers American Indians: Pittsburgh							Med	(25)
Poole (Vanderpoole): Towanda and Wyalusing	500							(82)
Susquehannock Area American Indians: Harrisburg								(26)
United Indians of Delaware Valley: Philadelphia								(25)
RHODE ISLAND								
Narragansett Indian Tribe: Wakefield	2,600	2	Yes, 1636				L., L. Ass. Med., Ed.	(83)

SOUTH CAROLINA									
Brass Ankles: Ridgeville	250								(44)
Four Holes Indian Organization: Ridgeville	250			Yes, 1715					(84)
Lumbee (Croatan): Ridgeville	604								(38)
Santee Tribe: Holly Hill									(38)
Summerville Indians: Dorchester, Calleton Counties	250								(78)
TEXAS									
Kickapoo (from Oklahoma)								L.	(80)
UTAH									
Southern Paiutes: Cedar City	162		(19)	Yes	1863, 1874			L.	(79)
VERMONT									
Abenaki: Swanton and environs	1,500			Yes, 1765				L. Ass. L, Ed	(85)
VIRGINIA									
Amherst Indian Tribe: Amherst County	200						CETA	Ed.	(86)
Chickahominy Tribe: Charles County	875						State	H., Ed.	(87)
Mattaponi Tribe (Powhatan): West Point	200		125	Yes, 1658			State	Cultural center	(88)
McLungeon, Ramps: Patrick County									(81)
Pamunkey: King Williams	55		800	Yes, 1677, 1646					(80)
Potomacs, Accohanoes, Nansemonds: Blue Ridge Mountains.									(89)
Rappahannock: Indian Neck	425		2				CETA	Ed., etc	(90)
WASHINGTON									
Chinook: Southwest Washington	2,000				Yes	Yes			(91)
Cowlitz Tribe: Southwest Washington	1,800	Yes			Yes	Yes		L.,L.Ass.	(91)
Duwamish Tribe: Seattle	1,100				Yes	Yes		do	(91)
Jamestown Clallam Tribe: Sequim	550				Yes	Yes		do	(91)
Kikiallus: Stanwood	50				Yes	Yes		do	(91)
Samish: Anacortes	560	Yes			Yes	Yes		do	(91)
Snake River: Eastern Washington					Yes	Yes		do	(91)
Snohomish: Snohomish County	700	Yes			Yes	Yes		do	(91)
Snoqualmie: Snohomish County	630	Yes			Yes	Yes		do	(91)
Steilacoom: Tacoma	[19] 150				Yes	Yes		do	(91)
Walla Walla: Southeast Washington					Yes	Yes		do	(91)
Wanapum: Yakima	30				Yes	Yes			(91)
Mitchell Bay: Western San Juan Island	150								(91)
Noo Wha Ha: Skagit City	20					Yes			(91)

Footnotes at end of table.

WISCONSIN							
Brotherton Community: Winnebago, Calumet Counties	254		Yes				([illegible])
Chippewas	181						([illegible])
Tripoli-McCord Chippewas	65						([illegible])
TOTALS							
Number of tribal groups	133						
Total available population figure	120, 858	[38] 250, 000					
Number of tribes with land		27					
Number of tribes with colonial treaties			37 plus				
Number of tribes with U.S. treaty rights				32 plus			
Number of tribes mentioned in BIA records					30 plus		
Most frequent Federal services now received						CETA, some education funds.	
Most frequent services requested						Housing, education, legal assistance, land.	

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[1] Theodore Taylor. The States and Their Indian Citizens, 228. Hereafter referred to as "Taylor."

[2] T. F. 10 Mailing List, hereafter "List"; and Map of Indian Areas, published by the Department of the Interior, hereafter cited as "BIA Map."

[3] Taylor, 229.

[4] Task Force 10 hearings at Tucson, Arizona, p. 14, hereafter cited as "Tucson." Baton Rouge hearings will be cited as "Baton Rouge" and Boston hearings will be cited "Boston."

[5] Taylor, 229.

[6] Tucson, p. 5.

[7] Dulac, 14.

[8] Task Force 10 Report, p. 139. Hereafter cited as "TF 10."

[9] Tucson, 28.

[10] TF 10, 131.

[11] Taylor, 229.

[12] Report of the BIA Commissioner, 1866.

[13] Call to Larry Colegrove of Colegrove & Associates.

[13a] TF 2 Report, p. 361.

[14] List.

[15] Federal and State Indian Reservation Trust Areas, U.S. Dept. of Commerce, p. 173.

[16] Boston, 109–110.

[17] TF 10, 80; Alfred A. Tamarin, "We have Not Vanished" (Chicago, 1974), 54.

[18] TF 10, 77; Tamarin, 56.

[19] TF 10. 75.

[20] TF 10, 75; Tamarin, 55.

[21] TF 10 77–79; Tamarin, 53.

[22] Taylor, 228.

[23] Haskell Indian Student in 1945. (A. Richardson, Tribal Community Sketches (manus.)

[24] Tamarin, 94.

[25] List (Task Force 10 Mailing List)

[25a] Taylor, 229.

[26] "The North American Indians" a map by Sol Tax and the University of Chicago.

[27] Phone call to the BIA.

[28] AIPRC Files; TF 2 Final Report, p. 361.

[29] Taylor, 228.
[30] BIA Maps, 39A: Sol Tax et al., The North American Indians (map).
[31] BAE Report 145, "The Indian Tribes of North America" (compiled by John R. Swanton), 292.
[32] Ibid., 298.
[33] Ibid., 229.
[34] Dulac, 11.
[35] Baton Rouge, 16.
[36] National Archives materials presented in The American Indian Journal, March 1976.
[37] Dulac, 13, 14, 15, 16, 58.
[38] Baton Rouge, 70.
[39] Dulac, 13; Baton Rouge, 72.
[40] Baton Rouge, 133.
[41] Baton Rouge Hearing, Testimony of Clyde Jackson.
[42] TF 10, 193–209.
[43] TF 10, 103.
[44] Tamarin, 98, BAE, 60.
[44a] Tamarin, 88.
[44b] Tamarin, 130.
[45] Tamarin, 116.
[46] 1911 estimate. BAE 145, 60.
[47] BAE 145, 58.
[48] Tamarin, 90–92.
[49] Boston, 34.
[50] TF 10, 83, 89.
[50a] Seasonal population. Boston, 31.
[50b] Boston, 34.
[51] Taylor, 229; "Federal and State Indian Reservation and Trust Areas," U.S. Department of Commerce, 1976, 225.
[52] Boston, 31.
[53] BAE 145, 262.
[54] BAE 145, 249.
[55] Commerce, 231.
[56] Taylor, 262.
[57] Taylor, 246.
[58] Phone call to BIA; BIA MAPS No. 50; Taylor, 229; BAE 246.
[59] Taylor, 229.
[60] BAE 145, 248.
[61] BIA Maps No. 8A, No. 51.
[62] BAE 145, 184.
[62a] Taylor, 229.
[63] BIA MAps No. 52A, Taylor, 229.
[64] TF 10, 106.
[65] Tamarin, 84.
[66] Tamarin, 82.
[67] TF 10, 96–99.
[68] TF 10 hearings; Tamarin, 81; Commerce, 412.
[68a] Tamarin, 84.
[69] Richardson, Tribal Community Sketches; Tamarin 113.
[70] TF 10, 174.
[71] Richardson, p. 3.
[72] Tamarin, 152, 156.
[73] Taylor, 230.
[74] TF 10, 160. Estimates of Lumbee population given as 35,000 to 40,000.
[75] Tamarin, 115; TF 10, 160–173.
[76] BIA phone call, Taylor, 230.
[77] Tamarin, 110.
[78] List.
[79] TF 10, 156–159.
[80] Dayton Daily News, Aug. 31, 1975.
[81] Tamarin, 112.
[82] Tamarin, 90.
[83] TF 10, 92–94, Tamarin, 50.
[84] List, BIA phone call, BAE 145, 98.
[85] Hearings at Boston, 118–119; TF 10, 105; Tamarin, 43.
[86] Richardson, p. 4; Tamarin, p. 112.
[87] Tamarin, 108–110, List.
[88] Tamarin, 107.
[89] Tamarin, 102–107.
[90] Tamarin, 111., Richardson, 0. 4.
[91] TF 10, 181–189; Report of the Governor's Task Force on Indian Affairs, The People Speak . . . Will You Listen? (Washington State, 1973), pp. 27–32; Conversation with Kenneth Hansen, consultant to Task Force 10.
[92] BIA phone call.
[93] Tamarin, 111.
[94] Several hundred.
[95] Conversation with Gamage Rivers.
[96] Cemetery.
[97] School.
[98] Church lands.
[99] Plus.
[100] Estimated range.

Note: Abbreviations—L., Land; L. Ass., Legal Assistance; T., Transportation; S.T., Sewage Treatment facilities; Med., Medicine or medical facilities; H, Housing; Ed., Educational Services; L.E., Law Enforcement.

Source: Compiled by Suzanne Ahn and David Harmon, American Indian Policy Review Commission, February 1977.

THE BIA AND THE DEPARTMENT OF THE INTERIOR

"Recognition" was a confusing problem when tribes began to request services after the termination era. At first, the BIA took a very limited attitude toward its trust responsibility and proposed that it only had a responsibility to Indian people who had tribal land bases. One Indian witness recalled this policy in his testimony before a Task Force Ten hearing:

> Another problem is our trust land; we have been told we cannot have Federal recognition, that if we had Federal trust land we could have Federal recognition. So, we have uncovered pieces of the Cowlitz tribe land in existence today. In going to the Regional Office of the Department we were informed that the thing to do was to go to the Area Office and get an application to apply with the heirs signing the paper, the Area Office will turn us down on that because we are not recognized and then we would appeal to the Commissioner who will definitely turn us down and then we would appeal to the Secretary who would turn us down and then we would sue, which is a lot of nonsense."[28]

In this administrative "Catch-22", recognition was denied because a tribe did not have any land in trust with the Federal Government; yet when there was tribally owned land, the United States refused to take in trust because the tribe was not recognized. Even the BIA could not ignore the problems this policy caused.

There were attempts in the BIA to develop a sound method of establishing a formal political relationship with so-called "unrecognized" tribes, but these efforts were hampered by two problems: (1) the lack of a legal foundation for administrative recognition of tribes; and (2) by a number of political considerations.

There is no congressionally sanctioned procedure for the Interior Department to adopt in recognizing more tribes, and there is no congressional statement of policy urging the Interior Department to establish such a procedure. While one might argue that congressional silence and the general nature of Indian laws gave Interior the power or obligation to recognize all tribes, Interior has not been convinced. It has taken a passive role and has extended services only to tribes that have treaties, have been mentioned in legislation, or have been dealt with by previous officials, with some notable exceptions. In the years since Congress supported termination legislation, the only method for recognition which Interior has felt safe with is direct and specific congressional recognition of tribes.

The second reason for Interior's reluctance to recognize tribes is largely political. In some areas, recognition might remove land from State taxation, bringing reverberations on Capitol Hill. There also is the problem of funding programs for these tribes.

Interior has denied services to some tribes solely on the grounds that there was only enough money for already-recognized tribes. Interior does not yet feel the issue is important enough to request from Congress additional appropriations for programs or study of the matter. Already-recognized tribes have accepted this "small pie" theory and have presented Interior with another political problem: The recognized tribes do not want additions to the list if it means they will have difficulty getting the funds they need.

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[28] Task Force Ten report, 1683.

Vague Proposals by Interior

Attempts at Interior to find a solution to tough issues produced vague policy that could not be used consistently and, in addition, had a fragile legal foundation.

In 1974, LaFollette Butler, Acting Deputy Commissioner of Indian Affairs, sent a letter to Senator Henry M. Jackson describing recent efforts to develop a recognition policy. He outlined a number of examples of tribes that had been recognized in the period 1961–1974 and concluded that the Interior Department had followed guidelines set down by Felix Cohen in determining that those tribes were to be recognized.

Cohen had stated, "In cases of special difficulty, a ruling has generally been obtained from the Solicitor for the Interior Department as to the tribal status of the group seeking to organize." The Solicitor's opinion, Cohen continued, was based on a number of "considerations" which Butler termed "criteria". According to Cohen:

> The considerations which, singly or jointly, have been particularly relied upon in reaching the conclusions that a group constitutes a "tribe" or "band" have been:
>
> (a) That the group has had treaty relations with the United States.
>
> (b) That the group has been denominated a tribe by act of Congress or Executive order.
>
> (c) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
>
> (d) That the group has been treated as a tribe or band by other Indian tribes.
>
> (e) That the Indian group has exercised political authority over its members, through a tribal concil or other governmental forms.[29]

In 1974, there were some people at Interior who felt that this reassertion of Cohen's considerations was not solidly within the Department's authority. More importantly, however, the "considerations" themselves were not very clear, clouded as they were by the vague qualification that they are to be used in "cases of special difficulty", and that they are to be "singly or jointly" "particularly relied upon".

Interior, furthermore, did not adhere to this, its own statement of policy. Tribes which requested advice on how to achieve recognition were sometimes told that they obviously did not meet the requirements even though BIA officials devoted little, if any, research to determining the validity of the group's claim.[30] One tribe which met all of the considerations, for example, was told that only by an act of Congress could they be recognized.[31] A large part of the Department's recognition policy depended on which official responded to the tribe's inquiries.

THE CONGRESS

Congress has always had the power to direct services to specific tribes through legislation, although this procedure is often the most difficult for a tribe to pursue. Even when tribes have been able to win the support of Members of Congress, the legislators themselves have been frustrated by obstacles. Especially when they are not members of the House or Senate Interior Committees, they have been as confused by recognition policy as their tribal constituents are.

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[29] LaFollette Butler to Senator Henry M. Jackson, app. II, part V, exhibit 15, vol. II, p. 306 of Task Force Nine report. Cohen's remarks appear on pages 140–141 of his 1940 edition of *The Handbook of Federal Indian Law*, reprinted by the University of New Mexico Press.

[30] *See* note 27, *supra*.

[31] Graham Holmes to Congressman Speedy O. Long, Mar. 15, 1965.

Congressman Speedy O. Long sought recognition of the Tunica Tribe in Louisiana from 1966 to 1968 only to be advised by a BIA spokesman, "It is extremely doubtful that Congress would act to establish a Federal reservation for the Tunica Indians."[32] That tribe, amazingly enough, has retained 130 acres even without Federal protection. Whether or not one Member of Congress could gain support for legislation identifying a specific tribe as eligible for general Indian programs, it was not likely that Congressmen would have the time to deal with obstacles presented by the BIA or to understand exactly why the policy of the United States was plagued with such undefined hesitancy.

THE COURTS

In the absence of administrative clarity and congressional policy, the judicial branch has had to address the status of some tribes labeled as "unrecognized" by the Federal executive branch.

A recent case, *Passamaquoddy* v. *Morton*, presented an important decision regarding the executive branch use of the distinction "recognized" and "nonrecognized". The Department stipulated for the purposes of the case that the Passamaquoddy were an Indian tribe, but argued that it was not required as trustee to prosecute the Passamaquoddy claim against the State of Maine, since the tribe was "unrecognized". The Court rejected the Interior's position finding that the Nonintercourse Acts apply and that the United States has a trust obligation to the tribe. The case makes it clear that the executive branch cannot arbitrarily exclude Indian tribes from its trust relationship. The case did not directly address the service component of the trust, and this issue has not been fully resolved.

Other questions also remain. Does the Interior Department have any power to exclude any group that professes to be an Indian tribe? What legal authority does the Department have for determining which groups are not Indian tribes? Finally, what factors or considerations can be consistently used in determining a group's Indian tribal authority?

It might take decades of litigation to resolve these questions. Short of every tribe procuring legal services and suing the United States for recognition, it is unthinkable that this issue can ever be solved in this method. Economics alone preclude this as a solution; in most unrecognized tribal communities, funds are unavailable for legal assistance. More importantly, however, many tribes would not welcome or could not withstand the social hostility and polarization which might occur within their communities and between their communities and neighboring people, while litigation proceeds.

THE TRIBES

From the viewpoint of tribes seeking to clarify their status with the Federal Government, undefined nonrecognition is an incomprehensible nonpolicy. The tribes have not been able to escape the historical circumstances and living conditions all Indians share, but they have been unable to obtain the services which other tribes receive. They do not understand the reason for this discrepency which defies logical explanation. The United States has permitted a flaw in the foundation of its Indian policy, in recognizing the beneficiaries of that policy—a fact that itself is incomprehensible to many people, Indians and non-Indians alike.

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[32] *Ibid.*

Even if a clear institutional procedure for the recognition of tribes is adopted, there will be problems for the Indian communties to face. In almost every case, the Indian heritage of every group seeking recognition is undeniable, but it may well be difficult for a number of tribes to prove their identity and document their history. Educational opportunities were limited, and sometimes nonexistent in unrecognized Indian communities. Not only were these Indians unable to attend Federal Indian schools, but they were often excluded from both schools for blacks and schools for whites. When tribal leaders cannot write, it is extremely difficult for them to present their case before the Federal Government. It may take a great deal of research to combat an offhand reply from a BIA official. Historical research is as difficult to finance as legal assistance is, so unless outside funding agencies aid these communities, their history remains buried. Commissioner Ada Deer addressed this point in the first Commission meeting: "It is a tremendous burden on the tribe to take on the Department of the Interior, take on the Congress . . . there are a number of tribes that have been denied recognition, that may not catch the fancy of some foundation or other group."

CONCLUSION: POLICY NEEDS

In conclusion, then, the Commission recommends a policy which meets the following requirements:

> There must be a firm legal foundation for the establishment and recognition of tribal relationships with the United States.
>
> There must be a valid and consistent set of factors applied to every Indian tribal group which seeks recognition.
>
> Every Indian tribal group which seeks recognition must be recognized; every determination that a group is not an Indian tribal group must be justified soundly on the failure of that group to meet any of the factors which would indicate Indian tribal existence.
>
> Funds must be extended to groups so that they can argue their cases for recognition.
>
> Recognition at this time must carry with it all the force and impact which recognition by treaties, legislation, or administrative actions have carried, but must not prejudice the tribe's right to determine what particular services and programs it desires.
>
> This recognition must not negate or affect in any way the previous recognition granted other tribes by treaties, legislation, or administrative action.

RECOMMENDATIONS

It is undeniable that Indian policy should be applied equitably to all Indian tribes. The primary recommendation of the Commission is that all of the unclear and unsettled aspects of this policy be resolved. The Commission recommends that procedures be established so that all tribes will be guaranteed their unique relationships with the United States. After adoption of the following recommendations, the words "nonfederally recognized" and federally "unrecognized" shall no longer be applied to Indian people.

CONGRESSIONAL DECLARATION OF POLICY

The Commission recommends that:

To clarify the intention of Congress and to dispel administrative hesitations, Congress adopt, in a concurrent resolution, a statement of policy affirming its intention to recognize all Indian tribes as eligible for the benefits and protections of general Indian legislation and Indian policy; and directing the executive branch to serve all Indian tribes.

That declaration of policy could be adopted along with Task Force Nine's "Congressional Statement of Findings and Declarations of Policy". In pertinent part, it reads:

> The Congress recognizes that there are numerous tribes and groups of Indian people who have been denied Federal recognition for lack of a treaty relationship with the United States or lack of other contact with Federal authorities administering the Federal Indian laws. The Congress recognizes that the continued refusal by the Federal authorities to accord Federal recognition to these tribal entities or communities of Indian people is not premised on grounds of equity or justice but is premised on the lack of adequate appropriation of funds to properly serve those tribes and people who are already federally recognized and because of the lack of any clear legislative guidelines to facilitate recognition. The Congress herewith declares its commitment to provide a mechanism for recognition of those Indian tribes or community groups who have previously been unrecognized and to couple this commitment with a commitment to appropriate such additional funds in the future as are necessary to provide services to these newly recognized entities without diminishment of services to those tribes already recognized.[23]

CREATION OF A SPECIAL OFFICE FOR THE ESTABLISHMENT OF THE FEDERAL INDIAN RELATIONSHIP

The Commission recommends that:

To insure that the above declaration is carried out, Congress, by legislation create a special office, for a specific period of operation, such as 10 years, independent from the present Bureau of Indian Affairs, entrusted with the responsibility of affirming tribes' relationships with the Federal Government and empowered to direct Federal-Indian programs to these tribal communities. The office have a dual function: (1) Affirming the Federal relationship with the petitioning tribes; and (2) negotiating the particular aspects of that relationship within the context of general Indian legislation and Indian law, but with the flexibility to meet each tribe's specific needs.

Functions of the Special Office: Affirming the Relationship

The Commission recommends that:

The first function include the following procedures:

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[23] Task Force Nine final report, vol. 1, p. 30. See also pp. 44–46.

The office contact all known so-called unrecognized tribes and inform them of their rights to establish a formal relationship with the Federal Government.

Technical assistance be provided for tribes, ensuring that they understand the office's procedures, and that they acquire legal assistance and professional assistance when they desire it for presenting their claims to this office. With the assistance of the special office, or with the assistance of persons designated by the tribe but paid by the office, the tribes may submit petitions for recognition to the office.

As soon as possible, but no later than 1 year after receipt of a tribe's petition, the office must decide on a group's eligibility as a tribe for Federal-Indian programs and services.

That decision must be decided on the definitional factors enumerated below, factors which are intended to identify any group which has its roots in the general historical circumstances all aboriginal peoples on this continent have shared.

At the end of 1 year, through appropriate hearings and investigation the office shall justify any rejection of a group's claim to tribal status with a written report documenting the group's failure to establish its inclusion in any one of seven enumerated definitional factors on page 482.

The group may appeal the office's ruling to a three-judge Federal District Court, as outlined below.

Determining the Immediate Direction of the Relationship

The Commission recommends that:

The second function of the office, to negotiate the tribe's particular status within the Federal-tribal system, is intended to place these newly recognized tribes on a firm footing so that their claims are clear, their rights are affirmed, their special needs are assessed, and so that actions may be taken immediately to improve their health, educational, and economic conditions.

This procedure will acknowledge these tribes' different priorities, and will assist in expediting actions on tribal priorities. It is not intended to be a process for limiting tribes' eligibility for any services or constraining the powers, rights, and special privileges of these tribes. The office will be directed to exercise good faith and trust in delineating the tribes' rights to services and protection of laws governing Indian affairs.

Specific Procedures To Be Followed by the Special Office

The Commission recommends that:

Congress direct this special office that for the purposes of fulfilling the Federal Government's obligation for the protection and well-being of American Indian tribes and aboriginal groups, and their resources, and for the identification of those groups, the following procedure will be followed:

A tribe or group or community claiming to be Indian or aboriginal to the United States be recognized unless the United States, acting through the special office created by Congress, can establish through hearings and investigations that the group does not meet any one of the following definitional factors:

a. The group exhibits evidence of historic continuance as an Indian tribal group from the time of European contact or from a time predating European contact. "Historic continuance" includes any subsequent fragmentation or division of a specific tribe or group, and any confederation or amalgamation of specific tribes, bands, or groups and subdivisions.

b. The Indian group has had treaty relations with the United States, individual States, or preexisting colonial and/or territorial governments. "Treaty relations" shall include any formal relationship based on a government's acknowledgment of the Indian group's separate or distinct status.

c. The group has been denominated an Indian tribe or designated as "Indian" by an Act of Congress or executive order of State governments which provided for, or otherwise affected or identified the governmental structure, jurisdiction, or property of the tribal groups in a special or unique relationship to the State government.

d. The Indian group has held collective rights in tribal lands or funds, whether or not it was expressly designated a tribe. "Lands" shall include lands reserved for the group's exclusive use, occupancy, or related general purposes which have been acquired by the group through Act of Congress, executive or administrative action, or through such related acts by preexisting colonial and/or territorial governments, or by State governments, or through the purchase of such lands by the group. "Funds" includes money designated for the group's exclusive use, possession, or related general purposes by Act of Congress, executive or administrative action, or by such related acts of preexisting colonial and/or territorial governments, or by State governments, or by judgment awards of the U.S. Court of Claims, U.S. Indian Claims Commission, Federal or State courts.

e. The group has been treated as Indian by other Indian tribes or groups. Such treatment can be evidenced by relationships established for purposes connected with crafts, sports, political affairs, social affairs, economic relations, or any intertribal activity.

f. The Indian group has exercised political authority over its members through a tribal council or other such governmental structures which the Indian group has determined and defined as its own form of government.

g. The group has been officially designated as an Indian tribe, group, or community by the Federal Government or by a State government, county (or parish) government, township, or local municipality.

2. If the United States finds that the claimants do not meet any of these definitional factors, such a determination must be made in writing to the claimants and the decision shall be reviewable by a three-judge Federal district court with the burden remaining upon the

United States to establish that the claimants are not an Indian tribal community.

3. If the United States affirms through the special office that a claimant tribe or group meets any one of the standards set forth above, it shall promptly begin negotiations with the tribe or group for purposes of extending all benefits and protections of the laws of the United States directed toward Indians to the extent agreed to by the tribe or group. The agencies designated to provide for the negotiation of protection and benefits shall submit to the Congress such additional requests for appropriations as are necessary to fulfill these obligations.

4. Technical assistance be provided by the special office, or by the prime agent of the trust, or by both, so that newly recognized tribes can determine their membership rolls. The process of determining the rolls will entail public notices, the formation of tribal enrollment committees to hear individuals' claims, and written statements of enrollment verification which must be recorded in duplicate by the prime agent of the trust. Tribes must set their own membership standards. This enrollment procedure may begin after the special office informs the group of its recognized tribal status, and may continue after the special office is terminated, although the process should be expedited by the office as fast as possible.

ADDITIONAL RECOMMENDATIONS[34]

The Commission recommends that:

Congress appropriate specific set-aside moneys for American Indian community governments and organizations currently not receiving Bureau of Indian Affairs services and programs to be utilized for program development, planning, and community-based operations. These funds to be an addition to the usual appropriations for the Office of Native American Programs (ONAP) within the Department of Health, Education, and Welfare. Such funds to serve as an interim measure while other Federal departments and agencies are implementing services to all Indians. (It should be noted that there should be a specific set-aside since less than 11 percent of the ONAP grantees during fiscal year 1975 were terminated or "nonfederally recognized" Indian tribes and organizations.)

To insure the success of such congressional directive and specific set-aside moneys, the Congress appropriate additional funds for distribution through the Federal departments and agencies on a grantee and nongrantee basis, specifically designed to provide contractual training and technical assistance for American Indian communities at statewide and regional levels. Further, to provide for the continuance of the self-determination without termination concepts surrounding the Indian Self-Determination Act passed in the 93d Congress, individual American Indian community governments and organizations and combinations thereof within a State or regional area are to be encouraged to perform the contractual negotiations with individual contractors, in a cooperative effort with the respective Federal agency. Additionally, to provide the necessary support for the development of non-BIA programs and services, and for the cooperative efforts between Federal agencies and Indian communities in policymaking and policy formation, the Congress stipulate and encourage the utilization and formation of the Indian Task Force concept on the Federal Regional Council level. (As such, the presence of an Indian task force at the New England Federal Regional Council has proven over the past few years to be highly effective in the areas mentioned above.)

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[34] These recommendations were proposed by Task Force Ten.

For the purposes of providing effective utilization and improvement of human resources within American Indian communities and for the successful continuance and rational development of community governments and organizations not currently receiving Bureau of Indian Affairs programs and services, the Congress establish a national Indian scholarship and fellowship program specifically designed to promote the educational development and training of the current Indian leadership within such communities and those young Indian adults who exhibit future leadership qualities and activities.

Congress direct the General Accounting Office to immediately proceed with full and complete investigations of the grant award procedures involving: the Office of Indian Education—title IV, parts A, B, and C; the Office of Native American Programs—Tribe and Urban; and the Office of Indian Manpower Programs—sec. 302 of the Comprehensive Employment and Training Act.

The Congress extend the statute of limitations as provided in 28 U.S.C. sec. 2415(b) so as to provide that actions which accrued on the date of enactment of such Act in accordance with subsection (g) thereof may be brought within 25 years after the right of action accrues, so as to provide time for Indian tribes, bands, or groups who have not had access to legal services, effective legal research, and effective historical research to seek redress through actions brought by the United States on their behalf under the Act.

The Census Bureau be directed to implement the recommendations suggested by Task Force Ten on pages 1703–1704 of its final report, so that so-called unrecognized Indians will be identified in the 1980 census.

CHAPTER TWELVE

SPECIAL CIRCUMSTANCES

Policy and law governing Indian affairs has not only differed from time to time, but has also differed from place to place. Among the tribes which have experienced unique application of law and policy are those in Alaska, Oklahoma, California, and the forgotten tribes of the Eastern Seaboard.

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CHAPTER TWELVE

SPECIAL CIRCUMSTANCES

A. ALASKA

GENERAL STATUS OF ALASKA NATIVES

Because of the scale, novelty, and uniqueness of the Alaska Native Claims Settlement Act,[1] it is understandable, though regrettable, that most contemporary consideration of the Alaska Natives[2] is in terms of this legislation. But to look at the Alaska Natives only through the lens of the Settlement Act is to miss the larger and more important part of the picture.

In aboriginal social and political organization, the Alaska Natives did not differ markedly from other American native peoples. They organized themselves into social and political units (groups or tribes)[3] as various and multiform, but of the same general nature, as those evolved by the Indians of the lower 48.

The treaty under which the United States acquired dominion over Alaska from Russia provided: "The uncivilized tribes in Alaska will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country."[4]

Between 1867 and 1900 the United States paid scant attention to the Natives (or anything else) in Alaska, although, from time to time, Congress acknowledged that the Natives had claims to the land, the settlement of which it reserved for a future time. For example, the Organic Act of 1884 stipulated:

> That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire the title to such lands is reserved for future legislation by Congress.[5]

When, after the beginning of the 20th century, the United States began to take notice of the Alaska Natives, it dealt with them in much the same way as it was then dealing with the Indians of the lower 48. Of course, by this time, the era during which the United States concluded formal treaties with Native tribes had ended[6] and, though several reservations eventually were established by various means for certain Alaska Native tribes, the reservation device was used far less widely in Alaska than in the lower 48.[7]

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[1] Act of Dec. 18, 1971, 85 Stat. 688, as amended, 43 U.S.C. 1601 et seq.

[2] The Alaska Natives comprise three distinct major ethnic groups: Indians, Eskimos, and Aleuts.

[3] Generally, the generic term "tribe" will be used in this subchapter to connote a Native political unit and will include such concepts as "group" and "village."

[4] Art. III, treaty of Mar. 30, 1867, 15 Stat. 539.

[5] Act of May 17, 1884, 23 Stat. 24; see also, Act of June 6, 1900, 31 Stat. 321.

[6] Congress prohibited the making of any more treaties with Native tribes in 1871. Act of Mar. 3, 1871, 16 Stat, 566 (25 U.S.C. 71).

[7] The circumstances that dictated the establishment of reservations for Native tribes in the lower 48, i.e., massive white coveting and invading of their aboriginal domains, did not exist, at least until recently, in Alaska.

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By and large, the United States recognized that the Native tribes of Alaska were of the same genus as the other Indian tribes within its jurisdiction, and formed its relationships with them and their members accordingly. In short, it regarded the Alaska Native tribes as dependent domestic sovereigns, possessed of the same attributes and powers as the Native tribes of the lower 48. And, just as in the case of other Native tribes, it acknowledged that a special relationship existed between it and the Alaska Native tribes and their members, as an incident of which it undertook to provide them with special services.

When Congress, in 1934, by adoption of the Indian Reorganization Act (IRA),[8] undertook to promote the strengthening of tribal governments, it expressly provided that "Eskimos and other aboriginal people of Alaska shall be considered Indians." 25 U.S.C. 479. And, when Congress was informed, regardless of its intent to extend the benefits of the IRA to Alaska Natives, that some were being excluded therefrom for want of reservations, it adopted an Act[9] providing that the Alaska Native tribes should be eligible to receive such benefits whether or not they possessed reservations or had been "recognized" previously.

About 70 Alaska Native groups or villages availed themselves of the privilege of organizing under the provisions of the IRA, while about 145 such groups or villages retained their traditional tribal forms.

Certain of these groups and villages (both among those that organized under the IRA and those that retained their traditional forms) were actually subdivisions of larger recognized tribal entities.[10]

In response to the desire of the Tlingit and Haida Tribes of southeastern Alaska to strengthen their general tribal government, Congress enacted legislation in 1965 to provide for the reorganization of their Central Council as a democratic and representative body, and to confirm the Central Council as the general and supreme governing body of the tribes as a whole.[11]

The essential nature and attributes of the Alaska Native tribes are not different from those of the Native tribes of the lower 48. They were not different before the adoption of the Settlement Act and they are not different today.

The Alaska Native tribes (referring, of course, to the historic and traditional tribal entities, not to the Native corporations organized under the Settlement Act), just as the tribes of the lower 48, are domestic sovereigns. They possess all of the attributes and powers normally appertaining to such status, except those that have been specifically denied or taken from them by Congress.[12] Vital among these are power to act in a corporate capacity; immunity from State and Federal income taxation; immunity from suit without consent; power to determine membership; and power to regulate the conduct of members as such.

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[8] Act of June 18, 1934, 48 Stat. 984.

[9] Act of May 1, 1936, 49 Stat. 1250 (25 U.S.C. 473a).

[10] For example, all 12 of the Native villages and groups located in southeastern Alaska (not including Metlakatla) that organized between 1938 and 1941 under the IRA, as well as several that did not, were all components of the confederated Tlingit and Haida Tribes, which the United States previously had recognized as a tribal entity. See, e.g., Act of June 19, 1935 (49 Stat. 388).

[11] Act of August 19, 1965, 79 Stat. 543. As demonstrating that such were the purposes of the Act, see, hearings on H.R. 874 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 89th Cong., 1st sess., ser. 4, at 2, 16, 108, 110, 115, and 117. A specific object of the 1965 Act was to make clear that the Central Council was empowered to act for the Tlingit and Haida Tribes as a whole, notwithstanding that many of its component groups and villages had been individually organized under the IRA.

See Commission note at p. 496.

Except that it used the reservation device more sparingly in Alaska than in the lower 48,[13] the United States dealt with and provided services to the Alaska Native tribes and their members in accordance with the same policies and programs as it employed elsewhere. It recognized that it had the same special relationship to the Native tribes and peoples of Alaska as to the Native tribes and peoples of the lower 48.

There is a grave misconception in some quarters that the Settlement Act was intended to effect a termination of the traditional Alaska Native tribes and of the special relationship existing between such tribes and their members, and the United States.

The Act engenders no such purpose. There were some in and out of Congress at the time it was in preparation who urged that it include provisions to terminate, particularly, the eligibility of the Alaska Natives to continue to receive special services based on their status as Natives.[14] But they lost. See section 2(c); 43 U.S.C. 1601(c).

Among other things, it was pointed out that the value of the Alaska Natives' eligibility to receive the special services generally made available by the United States to Native people, exceeded the amount of the monetary compensation provided by the Settlement Act, and that to cut off these services, while purporting to compensate the Natives for the extinguishment of their aboriginal claims, would be to leave them poorer than before.

The Settlement Act, as its very title implies, was intended to settle the historic claims of the Alaska Natives based on aboriginal title. Essentially it: (1) extinguished the aboriginal title held by the Alaska Natives collectively to virtually all the land in Alaska; and (2) provided compensation for such extinguishment.

The United States has settled the historic land claims of scores of Native tribes.

No such settlement has ever been held to have abolished the tribes concerned as political entities, to have affected their legal status, to have diminished their sovereign powers, or to have terminated the special relationship previously existing among them and their members and the United States.

The Settlement Act did not alter in any way the legal nature or status of any of the Alaska Native tribes. Nor did it alter the preexisting relationship between the United States and the Alaska Natives as members of such tribes. Particularly, the Settlement Act neither terminated the tribes nor the status as "Natives" of the members thereof.

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[12] Although, technically, the Alaska Native Tribes still possess a number of sovereign powers relating to the governance of territory (*e.g.*, to regulate hunting and fishing on tribal domain), these powers are largely in abeyance at the present time because the tribes currently do not possess tribal domains. However, were the United States in the future to set aside or acquire land in trust for an Alaska Native tribe, all of the slumbering powers of that tribe pertaining to the governance of territory would immediately rejuvenate. In short, lacking the subjects to which certain of the sovereign powers they still possess relate, the Alaska Native tribes at present have no occasion to exercise them.

[13] Not even in the lower 48 by any means, were reservations established for all of the historic tribes recognized by the United States.

[14] No one suggested that it should include provisions to extinguish, specifically, the legal existence of the traditional Alaska Native tribes or to extinguish the sovereign powers they retain as such. The Settlement Act did provide for the revocation of certain reservations, giving the Natives living thereon the option of receiving fee title to the lands thereof (forsaking the other benefits provided by the Act), or of taking the benefits generally provided by the Act. See section 19; 43 U.S.C. 1618.

It did not contemplate that after its enactment an Alaska Native would be any less "Native," or any less entitled to receive services as such, than he was before.

The setttlement of the claims of the Alaska Natives was unique only in that it was effected directly by Congress (rather than by a judicial tribunal invested with jurisdiction by Congress). But this difference did not change or expand the character or consequences of the settlement. It did not transmogrify a settlement of aboriginal claims into a termination of the Alaska tribes or of the status as Natives of the Alaska Native people.

It is precisely because the Settlement Act did not significantly affect, much less terminate, the preexisting institutions and relationships of the Alaska Natives, that to view them only through the lens of the Settlement Act is to miss more than is seen.

While the Alaska Natives are shareholders and operators of the new corporations created to administer the monetary and land compensation provided by the Settlement Act, more deeply and enduringly, they are American Natives who by and large still adhere to the same kinds of traditional institutions, relationships, and aspirations as their brothers to the south.

ALASKA NATIVE CLAIMS SETTLEMENT ACT

As a consideration for the extinguishment of their aboriginal title to virtually all the land in Alaska, the Settlement Act provides that the Alaska Natives, collectively, shall receive $962,500,000 and fee title to 40 millon acres of land.

Of the money, $462,500,000 is to be appropriated by Congress over a period of 11 years, and $500 million is to be derived over an indeterminant period from a 2 percent royalty on certain minerals produced from State and Federal lands. See sections 6 and 9; 43 U.S.C. 1605 and 1608.

Of the lands, the surface estate in about 22 million acres is to be conveyed, in quantities ranging from 23,040 to 161,280 acres per corporation, to each of over 200 Native village corporations organized under the Act. The subsurface estate in these 22 million acres, together with the whole fee simple estate in an additional 18 million acres, is to be conveyed in disparate quantities to each of 12 Native regional corporations. See sections 12, 14, and 16; 43 U.S.C. 1611, 1613, and 1615.

In section 2(b), 43 U.S.C. 1601(b), Congress declares, in part, that "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, [and] with maximum participation by Natives in decisions affecting their rights and property."

The Act provides for the enrollment of every Native to one of 13 regions[15] and, where appropriate, to a village within his region. See section 5; 43 U.S.C. 1604. It further requires the organization under Alaska law of a regional corporation for each region and of a village corporation for each village. See sections 7 and 8; 43 U.S.C. 1606 and 1607.

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[15] The 13th region was created for Natives residing outside of Alaska who chose not to enroll to their ancestoral regions. Hence, the 13th region contains no villages.

As it becomes available, the $962,500,000 monetary compensation provided by the Act is to be distributed to the regional corporations in proportion to the numbers of their shareholders. See section 6(c); 43 U.S.C. 1605(c). Each regional corporation, in turn, is required to redistribute one-half of its receipts from this source, pro rata, to its shareholders who are not shareholders of a village corporation and to the village corporations in its region in place of its shareholders who are also shareholders of such corporations. See section 7 (j), (k) and (m); 43 U.S.C. 1606 (j), (k) and (m).

Each of the 12 regional corporations eligible to receive land under the Act [16] is required to share 70 percent of all revenues derived from the timber resources and subsurface estates granted to it among all such corporations (including itself) according to the numbers of their shareholders. See section 7(i); 43 U.S.C. 1606(i). As in the case of the monetary compensation provided by the Act, each regional corporation is required to redistribute one-half of the revenues it receives under section 7(i) among its shareholders and the village corporations in its region.

The Act provides that the village corporations shall select the lands to which they are entitled within 3 years (ended December 18, 1974), and that the regional corporations shall select the lands to which they are entitled within 4 years (ended December 18, 1975). See sections 12, 14, 16, and 22(h); 43 U.S.C. 1611, 1613, 1615, and 1621(h). It stipulates that the Secretary shall issue patents "immediately" after the Native corporations have made their selections. See section 14 (a), (b), (e), and (f); 43 U.S.C. 1613 (a), (b), (e), and (f).

Section 17(b), 43 U.S.C. 1616(b), authorizes the reservation of easements across lands to be conveyed to the Native corporations, and at periodic points along the courses of major waterways, where reasonably necessary to guarantee international treaty obligations and access to remaining public lands.

The Secretary has taken the position that he has authority under this provision to reserve, for example, continuous linear easements 25 feet wide along the shores of all littoral and riparian lands, and blanket easements over the beds of most nonnavigable water courses, to be conveyed to the Native corporations.

Except pursuant to a court decree of separation, divorce or child support, stock in a Native regional or village corporation is not transferable inter vivos until December 18, 1991. On the death of a shareholder, however, such stock passes as any other property and may be inherited by a non-Native. See sections 7(h) and 8(c); 43 U.S.C. 1606(h) and 1607(c).

Section 21(d), 43 U.S.C. 1620(d), exempts lands conveyed to the Native corporations from State and local taxation until December 18, 1991, provided such lands are not developed or leased to third parties.

Section 17, 43 U.S.C. 1616, provides for the creation of the Joint Federal-State Land Use Planning Commission for Alaska and among other things (see, partic., section 17(d), 43 U.S.C. 1616(d)), contemplates the addition of a substantial quantity of land (80 million acres more or less) now in the general public domain, to the National Park, Forest, Wildlife Refuge and Wild River systems. Congress is currently considering several bills designed to implement the provision of section 17(d).

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[16] The 13th regional corporation is ineligible to receive land and is excluded from inter-regional revenue sharing. See, section 7(i); 43 U.S.C. 1606(i).

PROBLEMS

Related to Status in General

In their historic aspect, as Native peoples adhering to traditional tribal entities and having a special relationship with the United States, the Alaska Natives are beset by substantially the same problems as other American Natives.[17]

But they also suffer peculiarly at times from the failure of representatives of the Government and others with whom they deal to understand the nature of their institutions and to distinguish, for example, between their tribal organizations and the corporations established under the Settlement Act.

Perhaps because the traditional tribal entities and governing bodies of the Alaska Natives are not associated with reservations, the Alaska Natives sometimes have difficulty getting through to those with whom they deal that their tribal entities and governing bodies are of the same nature and possess the same powers as those of other Native peoples.

Representatives of the Internal Revenue Service, who seemingly have no difficulty understanding that the Navajo constitute a Native tribe, whose governing body is the Navajo Tribal Council, and that such a tribe "is not a taxable entity," [18] do not immediately apprehend, for example, that the Tlingit and Haida Indians also constitute a tribe,[19] whose governing body is the Central Council, and that the status of the Tlingit and Haida Tribes for income tax purposes is no different from that of the Navajo Tribe.

Definitions of "Indian tribe" and "tribal organization," such as are contained in section 4 of the Indian Self-Determination and Education Assistance Act,[20] have compounded the confusion.

The Self-Determination Act definies "Indian tribe" as meaning "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or village or regional corporation as defined in or established pursuant to the * * * Settlement Act." It defines "tribal organization" as meaning "the recognized governing body of any Indian tribe; and legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization * * *." It goes on to provide "that in the case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant."

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[17] "The Alaska Native people as a group are among the most disadvantaged citizens of the United States in terms of income, employment, educational attainment, life expectancy, health nutrition, housing and every important indicator of social welfare." Sen. Rep. No. 92-405, 92d Cong., 1st sess., 71-72 (1971).

[18] Rev. rule 67-284, pt. V; I.R.B. 1967-36, 8.

[19] More precisely, two tribes that confederated to form a single tribal entity.

[20] Act of Jan. 4, 1975, 88 Stat. 2203 (25 U.S.C. 450-458e); see also definitions contained in section 3 of the Indian Financing Act of Apr. 12, 1974, 88 Stat. 77 (25 U.S.C. 1451-1453).

The Natives of a single Alaska village or community, at once, may be organized: (1) in the form of a traditional tribe (or subtribe) under a governing council, (2) in the form authorized by the IRA, (3) in the form of a municipal corporation under State law, and (4) in the form of a village corporation under the Settlement Act.

In larger aggregations, the Natives of Alaska, at once, may be organized: (1) in the form of a classical tribe (as are the Tlingit and Haida under the Central Council), (2) in the form of a regional corporation under the Settlement Act, and (3) in the form of a voluntary association or nonprofit corporation structured on geographic and/or ethnic lines.

Although an organization of any of these forms meets the definition of "Indian tribe" used in the Self-Determination Act, it is only organizations of forms 1 and 2 at the village level, and of form 1 at the higher level, that are repositories of tribal sovereignty and are capable of exercising residual sovereign powers. Organizations of these three forms are both tribal and governmental in nature.

Municipal corporations, though governmental, are not tribal (or, indeed, even "Native") in nature. They are governmental subdivisions of the State.

The village and regional corporations organized pursuant to the Settlement Act are neither tribal (though they are predominantly "Native") nor governmental in nature. They are for-profit corporations organized under State law.

The voluntary associations or not-for-profit corporations structure on ethnic and geographic lines, in a sense, may be tribal in nature, but they have not been recognized as the repositories of tribal sovereignty, though in some cases (*e.g.*, in that of the Tanana Chiefs Conference) there is perhaps no reason why they should not be.

This, of course, is not to suggest that organizations of Alaska Natives other than those that are repositories of tribal sovereignty should be excluded from the benefits of existing and future legislation and programs designed to promote the development of Native peoples. It is only to point out that, typically, the Alaska Natives are organized in a number of forms some of which are classical tribal forms and some of which are not. Indeed, a native corporation organized under the Settlement Act might well be the form or organization best suited to sponsor certain kinds of federally funded programs.

The need is to obviate conflicts among organizations all of which are qualified applicants for benefits under particular laws and programs. The solution is not to disqualify certain kinds of Alaska Native organizations but to assign priorities among them.[21]

Ironically, in some cases the Self-Determination Act has diminished rather than enhanced Native involvement in the administration of Native affairs in Alaska. This has resulted not so much from conflicts among the various Native organizations, as from the obtuseness of certain officers of the BIA in understanding the Act and the status of certain Alaska Native organizations.

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[21] To limit benefits of programs only to Natives who could apply through a conventional tribal organization might disqualify certain Alaska Natives, who no longer adhere to such organizations but who are organized currently in other forms, such as regional and village corporations under the Settlement Act.

For over 6 years, the Central Council of the Tlingit and Haida Tribes has been managing the Southeast Alaska Indian Agency and administering Native affairs in that agency's area under contract with the Department of the Interior. This was one of the first "Native involvement" contracts let by the Department and, by any measure, has been one of the most successful.

Its renewal and continuation is now being impeded by the BIA's Alaska area director, who takes the position that it is a contract "benefiting more than one Indian tribe," within the meaning of the Self-Determination Act, which must be approved by "each such Indian tribe."

He apparently fails to understand that the Tlingit and Haida Indians constitute a single sovereign tribal entity and that the Central Council is the general and supreme governing body of that entity.[22]

In any event, the provision of the Self-Determination Act, related to the situation "where a contract is let * * * to an organization to perform services benefiting more than one Indian tribe," clearly has no application in the case of the Tlingit and Haida Tribes and their Central Council.

The provision does not apply in situations, like that of the Central Council, where the applicant is the governing body of a sovereign tribe, regardless that such tribe may incorporate individually recognized subdivisions. It was intended to apply in situations, like that of the United Sioux Tribes, where an organization composed of several equally sovereign tribes—but not itself a sovereign—might apply for a contract or grant to provide services to more than one tribe.

Commission Note

In its comments on the tentative final draft of this report, the Native American Rights Fund in Boulder, Colo., objected to the conclusion that Tlingit-Haida Central Council was a sovereign political entity with general governmental authority. The Tlingit-Haida Central Council also filed comments addressing this point (among others) presenting strong arguments in support of the conclusion that they are such an entity. Commissioner John Borbridge has filed individual remarks strongly supporting the Central Council, pointing specifically to the fact that the Council organized under a constitution which was approved by the Secretary of the Interior Department in 1973.

We have reviewed our discussion of the Tlingit-Haida Central Council issue and are satisfied that the composition of this Council has been fairly presented in this report. The recommendation for congressional recognition of the Central Council and the recommendation for establishment of priorities of native organizations in matters relating to contracts and/or grants under P.L. 93–638 are, therefore, retained.

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[22] As noted it was a principal purpose of the Act of June 19, 1935, supra, as amended by the Act of August 19, 1965, supra, to incorporate the smaller recognized communities of Tlingit and Haida Indians into a single tribal entity under the governance of the Central Council.

The present financial dependence of small native villages on Federal funding for their governmental operations must also be recognized. See particularly the Special Joint Task Force Report on Alaska Native Issues issued by this Commission in July, 1976, pages 21-24. We would, therefore, caution that the establishment of priorities for contracting and grants under P.L. 93-638 or any other Act must not operate to the exclusion of other entities.

Related to the Settlement Act

The most troublesome problem the Natives have encountered under the Settlement Act is gross delay in the conveyance of the 40 million acres of land to which they are entitled. The Act stipulates that the village corporations shall select their lands within 3 years, and that the regional corporations shall select their lands within 4 years after the date of its enactment.

The Native corporations selected their lands within these periods, which ended, respectively, on December 18, 1974, and December 18, 1975.

Notwithstanding that the Act mandates that the Secretary issue patents to the lands "immediately" after they are selected, as of now, more than a year after the time when Congress provided the Natives should have received patents to all of their lands, the Secretary of the Interior has issued "interim conveyances" to only a few acres.

The magnitude of the task of conventionally surveying the lands to which the Natives are entitled provides no excuse for this delay for the "interim conveyance" was devised, specifically, to permit the lands to be conveyed on the basis of existing aerial surveys, pending completion of conventional surveys, which the Secretary deems prerequisite to the issuance of final patents and now estimates will take several more years.

The delay has resulted primarily from maladministration of the Act by the Secretary and the Department of Interior and is seriously eroding the value of the settlement to the Natives.

An especially egregious example of how maladministration is delaying conveyances arises in connection with the Secretary's undertaking to reserve easements on lands to be conveyed to Natives that he clearly is not authorized to reserve under the Act.

The intent of section 17(b) was to permit the Secretary to reserve easements across Native lands and at periodic points along navigable waterways where reasonably necessary to provide access to remaining public lands and to discharge international treaty obligations. When he officially informed the Natives that he was going to attempt to reserve a number of types of easements not authorized by Congress, including linear shoreline easements and blanket easements over the beds of nonnavigable water courses, the Natives took him to court.

The Secretary then took the position that he could not issue interim conveyances to the Natives while his easement authority was being challenged, except the Natives would enter into complex agreements, partially surrendering their challenges, which will become effective only when incorporated into judicial stipulations. Thus does the Secretary postpone the vesting of the Natives' lands while bootstrapping a usurpation of authority into a requirement that the Natives surrender in part their judicial challenges to such usurpation.

Congress itself prescribed that the Natives are to receive a total of 40 million acres of land and, by and large, specified the formulas by which and the geographic areas from which the land is to be conveyed. Accordingly, the functions of the Secretary in carrying out the Native land provisions of the Settlement Act are substantially more ministerial than discretionary.

As the purpose of the provisions of the Environmental Policy Act that require the preparation of environmental impact statements is to guide the Executive in carrying out projects in connection with which he has substantial discretion, such purpose is not applicable in a case, like that presented by the Native land grant provisions of the Settlement Act, where the duties and functions of the Secretary, and the manner of their discharge, have been rather precisely mandated by Congress.

If, however, in spite of these considerations that militate against the applicability of the impact statement provisions of the NEPA to the Native land grants, it were to be judicially determined as some are contending, that such provisions are applicable, the receipt of the lands to which the Natives are entitled under the Settlement Act undoubtedly would be further delayed for protracted and unconscionable periods.

The Natives have been forced into the courts repeatedly to protect their rights under the Settlement Act from attempted derogations. In addition to their now pending suits (*Calista, et al.* v. *Kleppe* and *Sealaska Corp.* v. *Secretary*, U.S. Dist. Ct., Alaska) to protect their lands against the imposition of unlawful easements, a few other examples of such litigation are:

(1) Section 7(a) of the Settlement Act provides for the resolution of boundary disputes between regions by arbitration. The Secretary undertook to place an arbitrary time limit on such arbitrations. The courts held he was without authority to do so. *Central Coun. of Tlingit & H. Ind.* v. *Chugach Native Ass'n*, 502 F. 2d 1323 (9 Cir. 1974), *cert. den.*, 95 Sup. Ct. 1680.

(2) The Secretary took the position that he could deny applications for land made by individual natives under section 14(h) of the Act without according hearings. The courts held that this was a denial of due process. *Pence* v. *Kleppe*, 529 F. 2d 135 (9 Cir. 1976).

(3) The Secretary asserted in connection with determining that certain Native villages were ineligible for land grants under the Act that he need not accord them certain rights guaranteed by the Administrative Procedure Act. The courts disagreed, discountenancing, among other things, the Secretary's attempt to impose conditions for eligibility not found in the Act. *Koniag, Inc.* v. *Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975).

(4) And, of course, relative to the 13th region, the Secretary's conduct in preparing the Alaska Native roll was found wanting in a number of particulars. *Alaska Native Ass'n of Oregon* v. *Morton*, 417 F. Supp. 459 (D.D.C. 1974).

The Natives are currently not entitled to recover attorney fees where they successfully sue the Secretary on claims involving attempted derogations of their rights under the Settlement Act.

It is likely that Congress will undertake consideration this year of various bills to carry into effect the contemplation of section 17(d) of the Settlement Act that additional lands in Alaska (i.e., 80 million acres, more or less) should be added to such systems as the National Forests, Parks, Wildlife Refuges, and Wild and Scenic Rivers, or otherwise set aside for particular Federal uses and purposes.

In many cases, the Natives look to and use the lands (and the products thereof, including fish and animals) that are the subjects of these bills for their subsistence and economic maintenance. They can neither subsist themselves nor continue to conduct their traditional economic enterprises (e.g., commercial trapping) on the lands they are to receive under the Settlement Act because such lands are not sufficiently extensive. The Natives are concerned, first, that the placement of the lands they now use and require to maintain themselves into particular categories or systems not have the effect of impeding or prohibiting them from continuing to use such lands for traditional economic and subsistence purposes. Second, the Natives are concerned that the placement of Federal lands into particular categories or systems not have the effect of restricting the uses that might be made of the lands they receive under the Settlement Act. They are afraid, for example, unless such result is specifically avoided by Congress, that the placement of Federal lands in certain categories or systems might impose environmental standards on such lands (e.g., respecting the quality of air or water) that would have the effect of preventing the Natives from developing their own lands in the vicinity of such Federal lands in accordance with their highest and best economic uses. The Natives for example, do not want to find themselves in the position of being unable to operate a smelter, mill, or refinery on their own lands because Federal lands in the vicinity are placed in the National Park system under standards for the protection of the environment that effectively preclude the use of the Natives' lands for such purposes.

Some Natives have expressed concern that the provisions of the Settlement Act that subject their lands to State and local taxation and render the stock in their corporations alienable after 1991 are pregnant with potential to deprive them eventually of their lands and of control of their corporations. They point out that in many instances the Natives selected lands for traditional subsistence and lifestyle values and that such lands have little productive potential, in terms of the whiteman's economy, and small chance of ever being able to "pay their own way" in such an economy. They are keenly aware that subjection of Native lands in the lower 48 to taxation was a chief cause of the loss of millions of acres between 1880 and 1930.

Some of the Natives also expressed the view that, even in the whiteman's business world, the spectacle of raiders taking over control of corporations is common, and that, when the restrictions on alienation of their stock expire, the Native corporations will be sitting ducks for corporate raiders. They point out that even successful and profitable Native corporations will likely be vulnerable because their shareholders will not appreciate their rights and the dividends they receive as such with the same sophistication as others will appreciate the value of the assets the corporations represent.

A host of problems have developed in connection with the carrying out of the interregional revenue sharing provisions of section

7(i) of the Settlement Act. Just to scratch the surface, some of them are:

(1) What constitutes revenues from timber resources and subsurface estates?

(2) Are sand and gravel surface or subsurface resources?

(3) Does "revenues" mean net or gross revenues?

(4) Does "according to the number of Natives enrolled in each region" mean "according to the number of stockholders in each regional corporation" or something else?

(5) What is the nature of the legal relationship Congress intended should exist among the regional corporations relative to section 7(i) resources?

(6) Was it intended that the other regional corporations should have an economic interest in the 7(i) resources in place of the title holding corporation?

(7) How should nonmonetary consideration reserved by a title holding corporation in connection with a disposition of 7(i) resources be treated?

To this point, the carrying out of section 7(i) has proved a chaotic process. The Native corporations are currently involved in at least two complex lawsuits concerning its interpretation and implementation.

The executive branch and the departments and agencies thereof have built an antinative bias into the implementation of the Settlement Act. They have generally approached the task of implementing the Act from the wrong direction. Rather than looking first to the Act to ascertain what Congress desired to accomplish by its adoption, the officers of the executive seemingly look first to the other statutes and interests they are charged with administering. As a consequence, essential purposes of the Settlement Act and the results envisioned by Congress are distorted by filtration through the membranes of other laws and other interests not always compatible with the Act and with the interests of the Alaska Natives. A good example of the institutionalization of an anti-Native bias is the so-called Alaska Task Force set up within the Department of the Interior. Although created to advise the Secretary with respect to the implementation of the Settlement Act, this task force is composed of representatives of virtually all of the agencies within the Department, all of whom have an equal voice, and all but one or two of whom represent interests and constituencies both within and without the bureaucracy whose objectives are in large measure antithetical to those of the Natives.

So long as the Settlement Act is implemented in this fashion, it is not going to be applied in line with its essential purposes and the Natives are going to have to continue to repair to Congress and the courts to secure the benefits to which they are entitled thereunder.

CONCLUSIONS

Regardless that, in the main, the Alaska Natives were not located on reservations, the status of their traditional tribes and the nature of their relationship to the United States are essentially the same as those of other American Natives. They still desperately need the special services that the United States customarily makes available to Natives (Indians) based on their status as such. The Settlement Act was not intended to affect and did not affect the sovereign powers residing in the preexisting Alaska Native tribes. The Alaska Natives should be eligible, along with all the other American Natives, to receive the benefits of all existing and future legislation and programs designed, generally, to promote the development and welfare of American Natives.

There is need to establish an order of preference where competing applications are submitted by more than one of the several kinds of Alaska Native organizations that are qualified applicants for benefits under Federal laws and programs. Generally, preference should be given to larger organizations over smaller, particularly where a larger organization proposes to operate the program or provide the service concerned in an area that includes, but is more extensive than, that of the competing smaller organization or organizations. Where competing applications are submitted by organizations of the same magnitude, preference should usually be given to the one most tribal in nature.

The authority given the Secretary by the Settlement Act, where necessary, to reserve easements across lands to be granted to the Native corporations, and at periodic points along the courses of major waterways, was intended to be exercised strictly for the purpose of providing access to remaining public lands and discharging international treaty obligations. In undertaking to reserve easements of other types, for other purposes, the Secretary is grossly exceeding his authority.

Since Congress itself mandated the conveyance of 40 million acres of land to the Natives and Native corporations, and by and large defined the areas from which the land is to come, the Secretary, prior to making the grants called for by the Act, should not be required to prepare environmental impact statements.

The Settlement Act contemplated that all lands to which the Natives and Native corporations are entitled would be conveyed not later than early in 1976. At the present time, more than a year after Congress provided the process should be complete, only a fraction of the land has been conveyed. This unconscionable delay is almost entirely attributable to maladministration by the Secretary of the Interior and is seriously eroding the value of the compensation Congress intended the Natives to receive. If the past is prologue, there is no reason to expect more expeditious administration in the future unless Congress takes a hand and compels it.

At the time the Settlement Act was adopted it was supposed that the trans-Alaska pipeline would be flowing in about 3 years and that the $500 million in royalties the Natives were to receive likely would be paid out in 8 to 10 years. In 1973, Congress recognized that these suppositions had been too optimistic and that the Natives were not going to receive the $500 million nearly as soon as had been thought. Accordingly, it authorized the advance payment of royalties in the amount of $5 million every 6 months, commencing in fiscal year 1976, until oil should begin to flow in the pipeline. The Executive has consistently failed to request appropriations under this authorization and none have been made.

The placement of lands in certain national systems pursuant to section 17(d) of the Settlement Act could have the effect of prohibiting the Natives' continued use of the lands for subsistence purposes or of inhibiting the use of their own lands in the vicinity for purposes deemed incompatible with the preservation of the environment of the lands placed in the national systems.

The exposure of the lands the Natives are to receive under the Settlement Act to State and local taxation sets the stage for the lands eventually to be taken from them. In many cases, the Natives selected lands for purposes of subsistence and of preserving a way of life, which have small productive potential.

When the stock in the Native corporations becomes alienable, there is potential for control of the corporations—even of successful ones—to pass into nonnative hands. With control of the corporations goes control of their lands and other assets.

The interregional revenue sharing provisions of section 7(i) of the Settlement Act raise a number of thorny problems of interpretation and implementation. Some have suggested that Congress should consider creating an agency to administer 7(i) revenues.

RECOMMENDATIONS

The Commission recommends that:

1. Congress enact legislation prescribing the order of preference in which applications for benefits under Federal laws and programs will be received from the several kinds of Alaska Native organizations qualified as applicants.

2. Congress enact legislation confirming that the Tlingit and Haida Indians constitute a single tribal entity of which the Central Council is the general and supreme governing body.

3. Congress enact legislation confirming that the authority of the Secretary of the Interior to reserve easements on lands to be conveyed to Native corporations under the Settlement Act is strictly limited to definitely defined easements across such lands and at periodic points along the courses of navigable waterways that are necessary to discharge international treaty obligations and to provide access to remaining public lands. Specifically, Congress make clear that the Secretary is without authority to reserve any lineal easements along shorelines, any nonspecific, floating or blanket easements, or any easements to provide others with any rights to enter upon any lands (including water beds) to be conveyed to the Native corporations for any purpose other than to cross such lands by defined routes to reach remaining public lands.

4. Congress enact legislation confirming that the Secretary of the Interior is not required, prior to conveying lands to Natives and Native corporations under the Settlement Act, to prepare impact statements pursuant to the National Environmental Policy Act.

5. Congress enact legislation requiring the Secretary to convey all lands and estate and interests in lands that the Natives and the Native corporations are entitled to receive under the Settlement Act no later than December 31, 1978.

6. Congress increase its oversight relative to the carrying out of the Settlement Act in general, and relative to the conveying of lands to the Native corporations in particular. Congress require the Secretary to report to it not less frequently than once every 3 months

until it is satisfied that all lands to which the Native corporations are entitled under the Act have been conveyed.

7. Congress appropriate funds to provide the advance payments into the Alaska Native Fund that were authorized by section 407(a) of the Act of November 16, 1973, 87 Stat. 591, to ameliorate the adverse impact on the Alaska Natives of delay in construction of the Trans-Alaska Pipeline.

8. Congress take no action in implementing the provisions of section 17(d) of the Settlement Act, or otherwise, that would have the effect of diminishing or impairing the ability of Alaska Natives to make use of any lands or of the products thereof (including fish and animals), for subsistence purposes, or that would have the effect of restricting the uses that Native corporations might make of, or the activities they might conduct on, any land conveyed to them under the Settlement Act.

9. Congress enact legislation permanently exempting lands conveyed to Native corporations under the Settlement Act from State and local taxation, so long as they are not developed or leased, and during periods such lands are not productive of income, whether or not they were previously developed or leased.

10. Not later than during the 1st session of the 101st Congress or 1989, Congress undertake a comprehensive examination of the condition of the Alaska Natives and of the results of the Settlement Act, with a view, particularly, to determining whether the tax exemptions and the period of inalienability of stock currently provided by the Settlement Act be expanded or extended.

11. Congress conduct hearings to examine the problems that have arisen in interpreting and effectuating section 7(i) of the Settlement Act and to determine whether further legislation is desirable.

B. OKLAHOMA

INTRODUCTION

The special circumstances surrounding the problems of the Indian tribes of Oklahoma are traceable to the confusion created by the myriad of laws applicable only to Oklahoma. The problems faced by the Indian people in Oklahoma are similar to those faced by Indian tribes and individuals generally throughout the United States differing often only in degree.

HISTORICAL OVERVIEW

Oklahoma. The name itself is an Indian word meaning "people red."[1] The territory itself has been the domain of Spain, France, the United States, and many Indian nations.[2] For 50 years, Oklahoma was the exclusive domain of a number of tribes, some coming from as far away as New England and the Pacific Northwest.[3] Oklahoma was to be their home; a place where they might grow and advance, free from the pressures of white settlement; a place where their tribal bodies might remain intact, a right the tribes had earned and paid for with their determination and the blood of many of their people; a place which was "to be, and remain," theirs forever, under "the most solemn guarantee of the United States."[4]

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[1] Harlow, Vincent E., Harlow's Oklahoma History, 4th ed., Harlow Publishing Corp., Oklahoma City, Okla. p. 4.

[2] Department of the Interior, Bureau of Indian Affairs, Indians of Oklahoma, U.S. Government Printing Office, Washington, D.C., 1973, 0–496–170, p. 3.

[3] Ibid., p. 4.

These promises have deteriorated and the Indian people of Oklahoma face problems which are simply too overwhelming to be dealt with successfully given the meager resources of these tribes. Oklahoma is a microcosm of Indian country. Water rights, tribal government impotence, jurisdiction, tribal membership, treaty rights, taxation, sovereignty, poor housing, poor health, poor education, racial discrimination; all are problems facing the Indian people of Oklahoma.

Some might believe it would be easy for these people to abandon their Indian identity, for it has caused them, their forebearers, and will probably cause their children much anguish. Yet, they cling to their tribal identity and take great pride in their tribal cultures and languages which have incredibly survived a history of efforts at extermination and assimilation on the part of the United States.

Seventy years ago, in 1906, Pleasant Porter, a Principal Chief of the Creek Nation, made an appeal which this country would do well to consider in the aftermath of its bicentennial celebration. Chief Porter said:

> The vitality of our race still persists. We have not lived for naught. We are the original discoverers of this continent, and the conquerors of it from the animal kingdom, and on it first taught the arts of peace and war, and first planted the institutions of virtue, truth, and liberty. The European Nations found us here and were made aware that it was possible for men to exist and subsist here. We have given our life forces—the best blood of our ancestors having intermingled with that of their best statesmen and leading citizens. We have made ourselves an indestructible element in their national history. We have shown that what they believed were arid and desert places were habitable and capable of sustaining millions of people. We have led the vanguard of civilization in our conflicts with them for tribal existance from ocean to ocean. The race that has rendered this service to the other nations of mankind cannot utterly perish.[5]

In order to understand the complexity of the issues in Oklahoma, a review of the history of the Oklahoma tribes is necessary. Further, it is necessary to understand that there are at least four and probably five or six distinct "types" of tribes and their histories are as different as their languages and cultures.

Aboriginal Tribes

Coronado led the first European expedition into the lands which now comprise Oklahoma.[6] He encountered at least two tribes in Oklahoma; the Wichitas, a peaceful farming people, and the Querechos, who are believed to be the ancestors of the Plains Apaches.[7] It is estimated that there were six tribes claiming Oklahoma as their domain upon the arrival of the Europeans.[8]

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[4] Shmeckebier, Lawrence F., The Office of Indian Affairs, The Johns Hopkins Press, Baltimore, Md., 1927, p. 93.

[5] Report of the Creek Nation to the American Indian Policy Review Commission, unpublished, at dedication.

[6] Harlow, supra, p. 34.

[7] Ibid.

[8] Indians of Oklahoma, supra, p. 3.

Among the tribes presently located in Oklahoma, the Wichitas, Quapaws and Caddoes, and possibly the Kiowas, Fort Sill Apaches and Pawnees, were aboriginal to Oklahoma.[9]

After the Louisiana Purchase, the United States set about to make treaties with the aboriginal tribes so that they might establish title to the lands to which they hoped to remove the tribes east of the Mississippi. Unfortunately, the United States was confused as to which tribe held which lands. As a result, a treaty was made with the Quapaws for lands occupied by the Wichitas. After the mistake was discovered, the United States moved to set aside certain lands for the use of the Wichitas. Later, however, the Wichitas were forced to cede much of the land, as the United States said it had "given" the land to the tribe in the first place. Because of this confused history, the Wichitas have yet to have their aboriginal land claims adjudicated, even though the Indian Claims Commission has officially recognized the validity of their claims.[10]

On October 19, 1872, the Commissioner of Indian Affairs concluded an agreement [11] with the Wichita and affiliated tribes setting aside a reservation for their joint use in what is now southwestern Oklahoma. In exchange, the affected tribes ceded to the United States all of their territorial claims to other lands in Texas, Louisiana, and in Indian territory.[12] In commenting on the purposes for conclusion of this agreement, the Commissioner declared:

> These Wichitas and * * * [affiliated tribes] have always been friendly and loyal to the Government; have suffered severely on that account; * * * and absolutely require a reservation which they can call their own. For these reasons, as well as to quiet their claim to unceded lands, I recommend the ratification of the agreement * * *."[13]

Thereafter, pursuant to the agreement,[14] a reservation of approximately 743,000 acres was set aside in Indian territory for the Wichita and other tribes,[15] including the Delaware Tribe with whom the United States had treaties in 1866.[16]

Removal of the Five Civilized Tribes

Few Indian tribes presently located in Oklahoma are indigenous to the area. Although the Bureau of Indian Affairs, in its pamphlet entitled, Indians of Oklahoma, euphemistically refers to the State as the "melting pot of Indian America," it must be stressed that most tribes were forced to resettle there to surfeit non-Indian greed for homelands occupied by such tribes elsewhere in the country. As the Supreme Court recently stated in *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 625 (1970):

> A clash between the obligation of the United States to protect Indian property rights on the one hand and the policy of forcing their relinquishment on the other

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[9] Harlow, supra., p. 38.

[10] Testimony of Newton Lamar, Chairman, Wichita Tribe, at Hearings of the American Indian Policy Review Commission Task Forces 1, 2, 3, 4, and 9, Oklahoma City, Okla., May 10 and 11, 1976 (hereinafter referred to as Oklahoma City hearings) p. 357.

[11] See Annual Report of the Commissioner of Indian Affairs 101 (1872). Although this agreement apparently was never ratified formally by Congress, the Wichita and affiliated tribes were clearly recognized in subsequent legislation to have acquired right in the 1872 reservation. See e.g., Act of March 2, 1895, 28 Stat. 895; Act of June 14, 1924, 43 Stat. 366 (amended Apr. 21, 1932, 47 Stat. 87).

[12] Annual Report of the Commissioner of Indian Affairs 102 (1872).

[13] Ibid.

[14] See note 11, supra.

[15] See notes 34–36, infra, and accompanying text.

[16] Ibid.

was inevitable. With the passage of the Indian Removal Act of 1830, 4 Stat. 411, it became apparent that policy, not obligation, would prevail. In spite of the promises to protect the Indians' land and sovereignty, it was clear that the United States was unable or unwilling to prevent the States and their citizens from violating Indian rights.

Pursuant to the policy of the 1830 Removal Act, the United States between 1830 and 1835 concluded treaties with each of the so-called Five Civilized Tribes providing for their immediate or eventual removal from various Southeastern States to land subsequently designated as the Indian Territory (now Oklahoma).

When the tribes reluctantly agreed to leave their homelands, they had taken pains to insure that their sovereignty in their new domains be unquestioned. In the Treaty of Dancing Rabbit Creek, signed September 27, 1830,[17] the Choctaw Nation agreed reluctantly [18] to abandon their remaining lands in Mississippi and to remove to Indian Territory. There the United States pledged to convey land to the Choctaws "to insure to them while they shall exist as a nation and live on it." [19] The Federal Government further promised in that treaty to guarantee to the Choctaws:

> * * * jurisdiction and government of all persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation * * * and that no part of the land granted to them shall ever be embraced in any Territory or State.[20]

Similar provisions may be found in the removal treaties of each of the tribes.

As a result of the foregoing removal treaties, the United States granted to the Five Civilized Tribes the following amounts of land in Indian Territory: the Choctaws received what is today approximately the southern third of the State of Oklahoma, an area comprising the excess of 12,850,000 acres;[21] by subsequent treaties,[22] the Chickasaws were granted an undivided one-fourth interest in certain of the Choctaw lands, the Cherokee received a tract in excess of 5 million acres situated in what is now northern Oklahoma;[23] and the Creeks were granted over 6 million acres in the central portion of the present State and the Seminoles were accorded rights in the southern portion of the Creek lands.[24] All of these grants were in fee simple title, but the newly acquired tribal lands could not be alienated without the consent of the United States.[25]

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[17] 7 Stat. 333.

[18] The United States Supreme Court has noted that if the Choctaws had not signed the Treaty of Dancing Rabbit Creek they would have been "faced with the prospect of losing both their lands and way of life." *Choctaw Nation* v. *Oklahoma*, *supra*, 397 U.S. at 625. The efforts to remove the Choctaws west of the Mississippi actually commenced as early as 1820 when settlers came pouring into their aboriginal domain. *See* Cohen, Handbook of Federal Indian Law 56–58 (Univ. of N. Mex. edition, 1971) (hereinafter cited as "Cohen Handbook").

[19] 7 Stat. 333 (Art. II).

[20] Id. at 333–334 (Art. IV).

[21] Message on Surveys in the Indian Territory, Senate Ex. Doc. No. 32, 45th Cong., 2d sess. (Feb. 20, 1878) (hereinafter cited as 1878 Senate Ex. Doc.); *see Choctaw Nation* v. *Oklahoma*, supra, 397 U.S. at 626.

[22] Treaty of January 17, 1837, 11 Stat. 573; treaty of June 22, 1855, 11 Stat. 611.

[23] Senate Ex. Doc., supra, note 21.

[24] Report of the Creek Nation to the American Indian Policy Review Commission at 27 (transmitted Aug. 11, 1976) (hereinafter cited as "Creek Report").

[25] The fee title received by the Five Tribes in the Indian Territory was subject to the prohibitions of the Non-Intercourse Acts, now codified at 25 U.S.C. § 177 (1970), barring transfers of tribal land without congressional approval. Beyond this, tribal title was "terminable if and when these Indian nations ceased to exist or abandoned the territory—conditions not yet occurring." *Choctaw Nation* v. *Oklahoma*, supra, 397 U.S. 638–639 (Douglas, J., concurring).

Pursuant to these treaties, the Five Civilized Tribes "were indeed constituted as the sovereign autonomy established in lieu of a prospective State." [26] They were designated as the "Five Civilized Tribes" because they were well organized at the time of removal, maintaining their own legislative and judicial bodies.[27] In 1862, however, the President of the United States was authorized to abrogate all existing treaties with the Five Tribes because they sided with the Confederacy during the Civil War.[28] In 1866, new treaties were concluded with each tribe by which they agreed to surrender considerable portions of their respective Nations, to abolish slavery, and to assure membership and property rights to their former slaves, known as "freedmen." [29]

Removal of Midwestern Tribes

Although the Quapaw Tribe agreed to re-move to Indian Territory in the early 1830's,[30] the next significant period of major migrations into that Territory commenced after the Civil War. In the two decades which followed that war, numerous tribes were compelled to re-move. Many of them were located upon lands ceded by the Five Civilized Tribes pursuant to the 1866 treaties. For example, the Cheyenne and Arapaho, Kickapoo, Sac and Fox, and Iowa Tribes settled on part of the 3 million acres ceded by the Creeks,[31] and the Pawnees, Poncas and Otoe-Missourias received portions of the Cherokee cession.[32]

Post-Civil War removal of additional tribes to Indian Territory was motivated by considerations similar to those that influenced the forced migration of the Five Tribes—acquisition by the United States of land rights previously confirmed to tribes by treaty. The growing influx of non-Indian settlers into portions of the country north and west of the Indian territory had led to encroachment upon Indian treaty lands and hunting rights as well as resultant hostilities between the tribes and the settlers.[33] In exchange for vast cessions of territory by such tribes, the United States again solemnly pledged to set aside tracts in the Indian Territory as permanent homelands for the tribal signatories.

Thus, by treaty of July 4, 1866,[34] the Delaware Tribe agreed to sell their reservation in Kansas, and the United States in return "guarantee[d] * * * peaceable possession of their new home * * * in the Indian Country," with the limits thereof to be "clearly and permanently marked." [35] The Delawares, as well as other tribes including the Caddo and Wichita, were thereafter located upon a reservation comprising about 743,000 acres.[36]

Similarly, the Sac and Fox Nation of the Mississippi consented by treaty of February 18, 1867,[37] to leave their Kansas reserve and the

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[26] Id. at 638.

[27] See Cohen Handbook, supra, note 18, at 426–427 and case cited therein.

[28] Act of July 5, 1862, 12 Stat. 512, 528.

[29] See Cohen Handbook, supra, note 18, at 65, 427.

[30] Treaty of May 13, 1833, 7 Stat. 424.

[31] See Creek report, supra, note 28, at 27.

[32] See Annual Report of the Commissioner of Indian Affairs 463 (1906).

[33] See Cohen Handbook, supra, not 18 at 65. See also note 67 infra.

[34] 14 Stat. 793; II Kappler, Indian Affairs: Laws and Treaties 937 (hereinafter cited as "Kappler").

[35] II Kappler 939 (arts. 4 and 5).

[36] Statistical chart on western Oklahoma tribes, pp. 532–33.

[37] 15 Stat. 495; II Kappler 951.

"United States agree[d] to give to the Sac and Fox for their future home a tract of land in the Indian Country." [38] The concluding proviso of this treaty stipulated that funds due to the Nation under the instant document and other treaties would not be paid if tribal members "do not permanently reside on the reservation set apart to them by the Government in the Indian Territory." [39] Thereafter, a total of 479,669 acres were reserved as a home for the Sac and Fox.[40]

On February 27, 1867, a third tribe then resident in Kansas—the Potawatomies—signed a treaty [41] ceding their existing reservation in exchange for a "new home" in Indian Territory, which the United States pledged "shall be set apart as a reservation for the exclusive use and occupancy of that tribe." [42] Article of this treaty provided that the reservation established thereunder "shall never be included within the jurisdiction of any State or Territory * * *." [43] A reservation consisting of 588,567 acres was created thereafter for the joint use of the Potawatomie and Absentee Shawnee Tribes.[44]

The era of treatymaking with Indian tribes came to an end by congressional Act of 1871, but the force and validity of prior treaties remained intact.[45] Thereafter, land transactions between the United States and tribes frequently were consummated by so-called "agreements." These documents in legal effect differed from treaties only to the extent that both Houses of Congress, not merely the Senate, were authorized to ratify agreements.[46] After 1871, additional reservations were set aside in Indian Territory by Federal statutes and Executive orders. Most of these statutes and orders implemented either pre-1871 treaties calling for creation of new reservations in exchange for land cessions [47] or post-1871 agreements to this effect.

Thus, by Act of June 5, 1872,[48] a reservation was established for the Osage Tribe in Indian Territory following sale of their Kansas reserve.[49] The same Act provided that the Kansas or Kaw Tribe, whose lands in the State of Kansas also had been sold, could settle upon portions of the Osage Reservation.[50] The Osage came to occupy a reservation consisting of approximately 1,470,000 acres and the much smaller Kaw Tribe held a reservation comprising about 100,000 acres.[51]

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[38] II Kappler 952 (art. 6).

[39] II Kappler 955 (art. 21).

[40] Statistical chart on Western Oklahoma Tribes, pp. 532–33.

[41] 15 Stat. 531; II Kappler 970.

[42] Ibid. (art. 1).

[43] II Kappler 971 (art. 3).

[44] Western Oklahoma tribal chart, pp. 532–33.

[45] Act of Mar. 3, 1871, 16 Stat. 566, 25 U.S.C. § 71 (1970).

[46] See Cohen Handbook, supra, note 18, at 67.

[47] Most of the tribes for whom reservations were established in Indian Territory had concluded prior treaties with the United States. See Annual Report of the Commissioner of Indian Affairs 456-457, 462-463 (1906). Of the tribes for whom 13 separate reserves were set aside in what became Oklahoma Territory and is now roughly western Oklahoma, only the Tonkawas appear not to have concluded a Federal treaty. See Cohen Handbook, supra, note 13, at 457 et. seq. (Tribal index of materials on Indian law).

[48] 17 Stat. 228, I Kappler 137.

[49] The Osages had re-moved to Indian Territory pursuant to the Act of July 15, 1870, 16 Stat. 362, and settled upon a reservation there. However, this reserve had mistakenly included lands belonging to the Cherokees, and the 1872 Act was intended to confirm the Osage rights in the territory actually occupied. I Kappler 138.

[50] I Kappler 138. Although the 1872 Act authorizing settlement of the Kaws upon portions of the Osage Reservation, does not refer explicitly to creation of a separate "reservation" for them, this was the clear intent of the statute. *See, e.g.*, Act of July 1, 1902, 32 Stat. 636, providing for allotment of the Kaw "Reservation" and Annual Report of the Commissioner of Indian Affairs 462 (1906).

[51] Statistical chart on Western Oklahoma Tribes, pp. 532–33.

By Act of April 10, 1876,[52] a reservation was established for the Pawnee Tribe in Indian Territory consisting of about 283,000 acres,[53] and 2 years later, a reservation of more than 90,000 acres [54] was created for the Tonkawa Tribe by Act of May 25, 1878.[55]

By Act of March 3, 1881,[56] Congress authorized funds to purchase 101,894 acres in Indian Territory as a reservation for the Ponca Tribe and "to indemnify * * * for losses sustained by them in consequence of their removal to Indian Territory." [57] The Poncas actually had begun the forced migration south from their treaty lands in Nebraska several years before 1881, suffering great privation during the march and after arrival in Indian Territory.[58]

In the 1881 statute authorizing purchase of the Ponca reserve, Congress also provided for sale by the Secretary of Interior of the remaining treaty reservation owned by the Otoe and Missouria Tribes in the States of Kansas and Nebraska "with the consent of the * * * Indians, expressed in open council." [59] This Act further stipulated that with tribal consent the Secretary could "secure other reservation lands upon which to locate said Indians * * *." [60] The Otoe-Missouria Tribes thereafter went to Indian Territory to occupy a reservation comprising about 129,000 acres.[61] Finally, separate Executive Orders of August 15, 1883,[62] set aside reservations in that Territory for "the permanent use and occupation" of the Iowa Tribe (228,418 acres)[63] and the Kickapoo Tribe (206,466 acres).[64]

The Southern Plains Tribes

The fierce tribes of the southern plains constitute the remainder of the tribes in Oklahoma. The Comanches, Kiowas, Kiowapaches, Cheyennes, and Arapahoes had remained largely independent of the United States.

However, after the Civil War, the United States was able to subdue major portions of these tribes. In October, 1867, at Medicine Lodge Creek in the State of Kansas, the same United States Commissioners concluded separate treaties with the Kiowa, Comanche, and Apache Tribes [65] and the Cheyenne and Arapaho Tribes.[66] Pursuant thereto it was agreed [67] that the United States would set aside reservations in Indian Territory "for the absolute and undisturbed use and occupation" [68] of the tribes. In exchange, the tribes abandoned all territorial claims to enormous acreage outside of the new reserves;[69] and within these "permanent home[s]" [70] to be established for them the Federal Government "solemnly" pledged that:

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[52] 19 Stat. 29.

[53] Statistical chart on Western Oklahoma Tribes, pp. 532–33.

[54] Ibid.

[55] 20 Stat. 84.

[56] 21 Stat. 422 ; I Kappler 191.

[57] Ibid.

[58] See Acts of Aug. 15, 1876, 19 Stat. 192 ; Mar. 3, 1877, 19 Stat. 287 ; May 27, 1878, 20 Stat. 76. (See also U.S. ex. rel. *Standing Bear* v. *Crook*, 25 Fed. Cas. No. 14891 (C.C. Neb. 1879).

[59] 21 Stat 380 ; I Kappler 190.

[60] Ibid.

[61] Statistical chart on Western Oklahoma Tribes. Pursuant to authority delegated by the 1881 statute, the Secretary of the Interior set aside designated lands in Indian Territory "for the use and occupation of the confederated Otoe and Missouria Tribes" by order dated June 25, 1881. I Kappler 844.

[62] I Kappler 843-844 (Iowa) ; Id. at 844 (Kickapoo).

[63] Statistical chart on Western Oklahoma Tribes, pp. 532–33.

[64] Ibid.

[65] Treaty of Oct. 21, 1867, 15 Stat. 581, with the Kiowa and Comanche Tribes. On the same date a supplementary treaty was concluded with these tribes and the Apache Tribe whereby the three tribes were confederated, with the Apaches agreeing "to accept as their permanent home the reservation" in Indian Territory established by the main treaty. 15 Stat. 589.

[66] Treaty of Oct. 28, 1867, 15 Stat. 593.

> * * * no persons, except those herein authorized so to do and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations * * * shall ever be permitted to pass over, settle upon, or reside * * *.[71]

Both treaties provided, moreover, that three-fourths of all adult male members of the respective tribes would have to consent by subsequent treaty to any transfer of lands in the new reservations.[72] Clothed with this panoply of treaty guarantees, the Kiowa-Comanche-Apache Tribes thereafter settled upon a reservation comprising approximately 2,969,000 acres [73] in what is now western Oklahoma and immediately north thereof the Cheyenne-Arapaho Tribes occupied a reservation consisting of almost 4.3 million acres.[74]

Indian Territory

Thus, by 1882, a total of 25 Indian reservations had been established in the Indian Territory.[75] As noted above, these territorial enclaves had been erected in exchange for enormous land cessions by the tribes. The United States had pledged explicitly to several tribes that their territory would never be embraced within the limits, or subject to the laws, of any State or Territory, and that within their permanent reservation homelands they could live and govern as they chose free of the pernicious effects of non-Indians.

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[67] The tribal signatories at Medicine Lodge Creek were nomadic hunters who had no alternative but to agree to creation of reservations in Indian Territory where they might live free of non-Indian intrusions. The press of settlers into their territory had led to a treaty in 1861 with the Cheyenne-Arapaho Tribes whereby they ceded a large tract of land previously reserved to taem in Colorado, Kansas, and Nebraska in exchange for a considerably reduced reservation in Colorado. Treaty of Feb. 18, 1861, 12 Stat. 1163. Continued white encroachment upon the 1861 treaty reserve precipitated another treaty in 1865, 14 Stat. 703, whereby the Cheyenne-Arapaho were to re-move to a new reservation partly in Kansas and partly in Indian Territory.

In the same year the Kiowa and Comanche surrendered by treaty their claims to approximately 100 million acres in the West in exchange for which the United States promised territorial rights totaling more than 39 million acres. 14 Stat. 717; see *U.S. v. Kiowa, Comanche, and Apache Tribes*, 479 F. 2d 1369, 1372 (Ct. Cl. 1973). But hostilities with white intruders continued, see Cohn, supra, note 13, at 65, and the affected tribes were forced, in 1867, to cede more land in return for the much smaller reservations set aside for them in Indian Territory.

[68] II Kappler 977–978 (art. 2); II Kappler 985 (art. 2).

[69] II Kappler 980 (art. 11); II Kappler 988 (art. 11). Pursuant to these respective provisions, the tribes reserved expressly the right to hunt outside their new reservations on any lands south of the Arkansas River. See also note 51, supra.

[70] II Kappler 981 (art. 16); II Kappler 989 (art. 15).

[71] II Kappler 978 (art. 2); II Kappler 985 (art. 2).

[72] II Kappler 981 (art. 12); II Kappler 988 (art. 12).

[73] Statistical chart on Western Oklahoma Tribes, pp. 532–33.

[74] Ibid. The reservation set aside for the Cheyenne-Arapaho Tribes by article 2 of the 1867 treaty comprised approximately 5.1 million acres. For a variety of reasons the two confederated tribes never occupied that reserve, and a new one was set aside by Executive order of Aug. 10, 1869. I Kappler 839.

[75] A listing of the 13 reservations set aside in what is now western Oklahoma (after 1890 the Oklahoma Territory) appears at pp. 532–33. In what is now roughly eastern Oklahoma (after 1890 the reduced Indian Territory), Congress established, in addition to the respective territorial domains of the Five Civilized Tribes, the following seven reservations: Modoc, Ottawa, Peoria (occupied by Kaskasia, Miami, Peoria, Piankashaw, and Wea Tribes), Quapaw, Seneca, Shawnee, and Wyandotte. See Annual Report of the Commissioner of Indian Affairs 456–457 (1906).

Even in the absence of express treaty commitments to this effect, the mere establishment of a reservation operated implicitly to confirm the inherent governing powers of a tribe within the boundaries thereof.[76] Thus, as noted by the Assistant Secretary of the Interior in 1942, within the Indian Territory prior to 1890, "the [Federal] Government recognized the exclusive jurisdiction of the Indian tribes over their own members and even over nonmembers within their territories." [77] When Congress passed the so-called "Major Crimes Act" in 1885 providing for Federal or territorial court jurisdiction over certain offenses committed by Indians,[78] that Act "probably did not apply to the old [pre-1890] Indian Territory since there were no Territorial organization, laws and courts to function under the statute." [79]

But despite the express and implied Federal guarantees to preserve tribal territorial integrity, "[S]oon it was apparent that the seclusion and isolation which the Indians sought was to be disturbed." [80] Almost 200,000 "[L]and-hungry whites overflowed into the Indian Territory" [81] in the late 1880's, vastly outnumbering the Indians there.[82] Because of the absence of a territorial government and the ability of tribes to cope with the lawlessness of the numerically superior settlers,[83] considerable disorder ensued and Indian Territory "became a refuge for criminals from neighboring states." [84]

In response to these problems posed by the growing influx of non-Indians, Congress on March 1, 1889, enacted legislation [85] creating a United States court at Muscogee in Indian Territory. This court was granted limited criminal and civil jurisdiction, but crimes and controversies between Indians were specifically excluded.[86] The same Act also authorized the President to open to settlement land in the Territory that had been ceded to the United States by the Creek and Seminole Nations.[87]

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[76] See Cohen Handbook, supra.

[77] Letter of Oscar L. Chapman, Assistant Secretary of the Interior, to the Attorney General of the United States, dated Aug. 17, 1942, at p. 1 (hereinafter cited as "1942 Secretarial letter"). This document is attached as exhibit 3 in pt. VIII, app. II of the final report of Task Force No. 9.

[78] Act of Mar. 3, 1885, 23 Stat. 385, now codified at 18 U.S.C. § 1153 (1970). The original 7 major crimes have been expanded to include a current total of 14 felony offenses. *See* ch. 3 infra.

[79] 1942 Secretarial letter.

[80] Cohen Handbook, supra, note 18, at 427.

[81] Ibid.

[82] By late 1889, there were approximately 277,200 people in Indian Territory, and more than 190,000 were non-Indians. In the western portion thereof, soon to become Oklahoma Territory (now roughly western Oklahoma), it was estimated that there were at least 90,000 whites and about 12,000 Indians. H. Rept. No. 66, Organization of the Territory of Oklahoma and Establishment of Courts in the Indian Territory, 51st Cong., 1st sess. 4, 7–8 (Fed. 15, 1890 (hereinafter cited as "1890 H. Rept.")).

[83] The tribes in Indian Territory were "especially interested in the suppression of lawlessness in their midst (due to) contact with the criminal classes of all other nationalities, who commit crimes and depredations and in many cases escape without punishment." 1890 H. Rept., supra, note 92, at 8.

[84] Cohen Handbook, supra, note 18, at 427. See also 1890 H. Rept., supra, note 92, at 9–11.

[85] 25 Stat. 783.

[86] Sec. 5 of the 1889 Act conferred jurisdiction upon the Muscogee Court over certain minor offenses, defined in §§ 20–26, but § 27 stipulated that such jurisdiction would not extend to "offenses committed by one Indian upon the person or property of another Indian." Civil jurisdiction granted the new Federal court under this Act was made inapplicable via § 6 thereof to "controversies between persons of Indian blood only."

The Act of Feb. 15, 1888, 25 Stat. 33, made provision for punishing robbery, burglary, and larceny committed within the Indian Territory and vested jurisdiction thereover in United States courts located in adjoining States. Congress specifically declared, however, that "this Act shall not be so construed as to apply to any offenses committed by one Indian against the person or property of another Indian."

[87] See 1890 H. Rept., supra, note 92, at 3–4.

On the following day, March 2, 1889, another Federal statute [88] was passed to meet the swelling non-Indian land rush. This law created the Cherokee or Jerome Commission to negotiate with the tribes in Indian Territory for the allotment of their reservations among tribal members and the sale of surplus lands therein to non-Indians. Thereafter, by proclamation [89] of March 23, 1889, the President authorized the Creek-Seminole ceded lands to be opened to settlers on April 22, 1889. This was the first of many land openings in what is now Oklahoma, and the area thus made available—1,887,796 acres—became known as "Oklahoma proper." [90]

As a result of the opening of Oklahoma proper and in anticipation of vast tracts of tribal land that the Jerome Commission would purchase, the migration of settlers to Indian Territory continued. The massive infusion of non-Indians, coupled with the rather limited jurisdiction over them that had been conferred upon the Federal courts at Muscogee and in adjoining States,[91] produced a push for erection of a territorial government.[92] Thus, on December 9, 1889, legislation was introduced for this purpose and on May 2, 1890, Congress passed the "Organic Act" [93] establishing the Oklahoma Territory.

Events from 1890 to 1906

The events commencing with the passage of the Oklahoma Organic Act in 1890 and concluding with admission of the State of Oklahoma into the Union in 1907 are extremely crucial to an understanding of the current legal status and jurisdictional powers of the Oklahoma tribes.[94]

> These are the things we have to look at * * *. We gave * * *. We gave our land to these people * * *. We don't have to say we never gave anything. All we want is justice and that is all we want * * *. We want to be treated fair and square because I think we Indians have something to offer to the United States.—Dana Knight [95]

While the problems are great all across Indian country, the problems of Oklahoma tribes are intensified by their cloudy legal status. *De facto* policy of the United States and the State of Oklahoma has crippled the socioeconomic development of the Oklahoma tribes. Rather than dealing with the issues head-on, the Federal Government through the Bureau of Indian Affairs, has chosen to stay in the background and avoid confrontations, to the detriment of the tribes.

Water rights, jurisdiction, taxation; all are major issues in Oklahoma which the Federal Government has chosen to ignore while the State of Oklahoma continues to assert powers the tribes believe to be their own.

The Indians of Oklahoma are paying the price for this negligence. While they could be among the most prosperous tribes in the country, they are among the poorest, while vast resources which they believe to be theirs are taken and controlled by non-Indians for non-Indian use.

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[88] 25 Stat. 980.

[89] *See* 1890 H. Rept., supra, note 92, at 4; Messages and Papers of the Presidents, vol. IX, p. 15.

[90] 1890 H. Rept., supra, note 92, at 3–4.

[91] See note 86, supra.

[92] The President in opening "Oklahoma proper" had expressed concern that a territorial government needed to be established, *see* note 99, supra, and Congress had received numerous petitions for such a government by settlers who had entered the former Creek-Seminole lands opened by the President's proclamation. *See* 20 Cong. Rec. 58, 173, 1544, 1765, 1880, 1918, 1965, 1999, 2236, 2371, 2426 (1889).

[93] 26 Stat. 81.

[94] See, generally, Cohen Handbook, supra.

[95] Oklahoma City hearings, supra, p. 217.

In this section, we will outline the opinions of tribal leaders, and report the findings of the Commission with regard to the issues raised.

TRIBAL SOVEREIGNTY AND TERRITORIAL RIGHTS

> The Cherokee Nation exists as a sovereign, subject only to the sovereignty of the United States * * * and the provisions in the Constitution for dealing with Indian tribes.—Ross Swimmer[96]

Prior to 1890, it is clear that the Oklahoma tribes maintained full sovereignty with regard to tribal territory and tribal members. After 1890, the situation becomes less clear. As a practical matter, all Oklahoma tribes have suffered because the Federal Government did not keep its pledge to protect the "permanent" reservation homelands established for them. As a matter of law, however, some tribes have fared more fortunately than others. The legal distinctions beginning in 1890 among Oklahoma tribes—primarily those in the western as opposed to the eastern portion of the present State—have for too long gone unrecognized. The State of Oklahoma has consistently failed to recognize these distinctions as shown by State documents claiming jurisdiction over all Indians in the State but citing only judicial decisions and legislation affecting eastern Oklahoma.

1. Eastern Oklahoma

The sovereignty of the tribes in eastern Oklahoma is more difficult to define than that of the tribes of western Oklahoma. That the tribes of eastern Oklahoma maintain their political relationship with the United States, and that the tribal existence and tribal governments continue, is undeniable.[97] As with other tribes, the easiest way to define tribal powers is to define what powers the tribes do not have.

In the 1890 Organic Act, it is clear that the tribes retained their sovereign character. The jurisdiction of the tribes was also unquestioned, where conflicts arose between Indians. The Act of March 1, 1889, which created a United States court in the Indian Territory placed "exclusive original jurisdiction over all offenses against the laws of the United States within the Indian Territory, not punishable by death or by imprisonment at hard labor"[98] in the realm of the said court. However, section 27 of the same Act declares that this conferral of jurisdiction "shall not be construed as to apply to offenses committed by one Indian upon the person or property of another Indian."[99] The Organic Act limits the jurisdiction of the courts created in the Act by stating:

> That the court established by said Act (of March 1, 1889) shall, in addition to the jurisdiction conferred thereon by said Act, have and exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction.[100]

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[96] Hearings before American Indian Policy Review Commission Task Forces 1, 2, 3, 4, and 9, Muskogee, Okla., May 13 and 14 (hearings hereinafter referred to as Muskogee hearings), p. 60.

[97] Ibid., see also, *Harjo v. Kleppe*, C.A. No. 74-189, U.S.D. D.C., Opinion and Order filed 9/2/1976.

[98] 25 Stat. 1, 783.

[99] Ibid.

[100] 26 Stat. 81.

One further qualifier of the jurisdiction of the court was added in section which reads:

> That jurisdiction is hereby conferred upon the United States Court in the Indian Territory over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Indian Territory, and any citizen or members of one tribe or nation who may commit any offense or crime against the person or property of a citizen or member of another tribe or nation shall be subject to the same punishment in the Indian Territory as he would be if both parties were citizens of the United States. And any member or citizen of any Indian tribe or nation in the Indian Territory shall have the right to invoke the aid of said court therein for the protection of his person or property as against any person not a member of the same tribe or as though he were a citizen of the United States.[101]

The essential thrust of the Organic Act was to establish a more comprehensive system of laws and courts for the non-Indians who had poured into Indian Territory in the 1880's.[102] The history of the Act offers firm evidence that the tribes in the Territory, including the Five Civilized Tribes, favored such action because of the menace posed by non-Indians and because tribal self-governing powers would remain largely intact under the Organic Act. Thus, the House Committee considering enactment of the legislation declared:

> Your committee are of the opinion that every right of any Indian tribe in the Indian Territory as heretofore defined (prior to 1890) has been carefully guarded and protected in the accompanying bill.
>
> The bill was discussed at great length by the representatives of the Five Civilized tribes and by others, and such concessions and amendments were made as to practically reconcile all objections so far as the Indian tribes are concerned.
>
> * * * * * * *
>
> The whole Indian Territory as heretofore defined (pre-1890) has, owing to the failure of Congress to provide courts adequate to the wants of the people, became the refuge of criminals and desperadoes from all parts of the country. Nothing but the establishment of a Territorial government over that region and courts in the Five Civilized Tribes will arrest the carnival of crime which prevails there, or protect the Indians therein from the rapidly increasing invasion of the criminal classes.
>
> * * * all the people in those Territories [new Oklahoma Territory and diminished Indian Territory] are entitled to that protection which just laws and local courts alone can give. The Indians are especially interested in the suppression of lawlessness in their midst. While they are amenable to their tribal laws and courts, yet there can be no security to their persons or property so long as they are in contact with the criminal classes of all other nationalities, who commit crimes and depredations and in many cases escape without punishment.[103]

The situation changed dramatically with the Act of June 7, 1897, when Congress declared:

> That on and after January first, eighteen hundred and ninety-eight, the United States Courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory * * * and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, and courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes * * *.[104]

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[101] Ibid.

[102] H. Rept. No. 66, Organization of the Territory of Oklahoma and Establishment of Courts in the Indian Territory, 51st Cong., 1st sess., p. 3–4.

[103] Ibid.

[104] 30 Stat., 62.

The Act of June 28, 1898, furthered the erosion of tribal rights. The Act reads:

> SEC. 26. That on and after the passage of this Act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory * * *.
>
> SEC. 28. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished * * *.[105]

The intent of Congress is made very clear in section 29 of the Act:

> It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal government so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union * * *.[106]

Further enactments by Congress strengthened the notion that Indian Territory was soon to no longer be Indian Country and under the protectorship of the United States. The Act of March 3, 1901, made, "every Indian in Indian Territory"[107] a citizen of the United States, and the last proviso of the Act of May 8, 1906, provided that Indians in the Indian Territory were excluded from the provision in the Act stating that all allottees would be under the exclusive jurisdiction of the United States until the end of the trust period.[108]

Clearly, then, as the State courts assumed the powers of the territorial and Federal courts which preceded them, the Indians of eastern Oklahoma [former Indian Territory] came under the jurisdiction of State law, where they remain to this day.

The relationship of the United States with the Five Civilized Tribes can only be described as a complete breach of faith. For centuries, the Europeans urged the Indians to become "civilized." The Five Civilized Tribes were symbols of the type of advancement of which the Indian nations were capable. In spite of the devastation of removal, the tribes resumed their cultural, social, political, and economic growth in their new home, only to see their efforts rewarded with the destruction of their tribal entities by a government which had pledged itself to their protection.

2. Western Oklahoma

Surprisingly, the sovereignty of the tribes in western Oklahoma has survived the years remarkably intact.

As with the tribes of eastern Oklahoma, the sovereignty of the tribes was unquestioned prior to 1890. In the 1890 Organic Act, Congress reaffirmed these rights when it said of the Act and its effect on Oklahoma Territoriy (now roughly western Oklahoma):

> Provided that nothing in this Act shall be construed to impair any right now pertaining to any Indians or Indian tribes in said territory under the laws, agreements, and treaties of the United States, or impair the rights of person or property pertaining to said Indians, or to effect the authority of the government of the United States to make any regulation or to make any law respecting said

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[105] 30 Stat., 495.

[106] Ibid.

[107] 31 Stat. 1447.

[108] 34 Stat., 183.

Indians, their lands, property or other rights which it would have been competent to make or enact if this Act had not been passed.

Later in the Organic Act, jurisdiction is conferred on territorial courts "over all controversies arising between members or citizens of one tribe or nation of Indians and the members or citizens of other tribes or nations in the Territory of Oklahoma." The Act goes on to say that the new territory had no jurisdiction over matters between Indians of the same tribe. Further, the Act does not negate the power of the tribes to police the tribal domain with regard to non-Indians on Indian land.

Where the Act of June 7, 1897 [30 Stat. 83], placed the Indians in Indian Territory [eastern Oklahoma] under the jurisdiction of territorial courts, no similar changes were made in the Oklahoma Territory.

With the passage of the Statehood Act of 1906, the jurisdiction of the territorial courts was transferred to the State courts. However, included in the Act was a provision which stated:

> Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories [so long as such rights shall remain unextinguishable] or to limit or affect the authority of the Government of the United States to make any law or regulation respecting; such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.[109]

The State did include a disclaimer of authority over Indian lands in its constitution, and the section has never been amended to authorize the assumption of jurisdiction over Indian lands.[110] Further, aside from this discussion of jurisdiction, the rights of the tribes to retain their full, sovereign powers have never been extinguished. It is the view of the Commission that the sovereign powers of the tribes of western Oklahoma with regard to Indian land within the original reservation boundaries remain intact. The encroachment on the part of the State of Oklahoma on tribal rights has been a result of *de facto* policy on the part of the United States, policy which should never have come about and must be discontinued.

It is most interesting that these tribes, who understood less of the workings of American law than did the Five Civilized Tribes, have fared better than the eastern Oklahoma tribes in terms of the retention of sovereign powers. Perhaps it is that their seeming disinclination to exercise these powers is the reason they were never extinguished.

JURISDICTION

> On the issues of jurisdiction * * * we feel that this subject is very important due to the fact that the state, city, and county governments are zoning, annexing, and encroaching on the property and powers of the government of the Absentee Shawnee Tribe. The failure of other units of government to recognize the power and authority of the Absentee Shawnee Tribe, which we of the Tribe have never relinquished, only cause dissatisfaction and problems and complications with all concerned. We want to work with other governments of the state in coordination with both government objectives. There will be no coordination of effort if the power of one government is unrecognized. Therefore, we ask the

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[109] 34 Stat. 267.

[110] See art. I, sec. 3 of Oklahoma Constitution.

> Federal Government to act on legislation that requires the recognition of the authority and power of the Absentee Shawnee Tribe as a government of its membership.—Danny Little Axe [111]
>
> We have property surrounding * * * Riverside Indian School which is located in Anadarko, Oklahoma. Recently, we had a riot out there, and the local county-city police officers came out to the school. As soon as they saw what they were faced with and as soon as they got their first car [turned over], they decided they had no jurisdiction and left rather hurriedly. And the school was left without any police protection whatsoever.—Newt Lamar [112]

The issue of jurisdiction as an element of tribal sovereignty has been developed in the previous section. The status of the tribes up to and immediately after statehood has been shown. However, the legal matters of jurisdiction have remained fairly static since 1907, while the practical applications, or lack thereof, will dominate discussion of the issue in this section.

The only significant legislation regarding the status of the Oklahoma tribes since 1907 is the Oklahoma Indian Welfare Act passed in 1936. The Act extended provisions of the Indian Reorganization Act (Wheeler-Howard Act) of 1934 which had previously excluded Oklahoma tribes.[113] Mention should be made of Public Law 83–280, mainly to emphasize that the tribes of Oklahoma do not have this burden to bear. The State of Oklahoma claimed, at the time that P.L. 83–280 was being considered, that the Act was not necessary for Oklahoma as the State already held jurisdiction over Indians in the State.[114] While this may be true for eastern Oklahoma, the State jurisdiction over Indians on trust land in western Oklahoma is legally questionable. However, as a matter of practice, the tribes of western Oklahoma exercise few, if any, of their jurisdictional powers. There are several reasons for this.

At or shortly after allotment, the tribal police forces fell into increasing disuse and more or less faded from existence sometimes in the early 1940's. We have found no legislation or administrative authority of any kind to make the disappearance of tribal police an occurrence predicated by law.

The State of Oklahoma conducted all law enforcement activities on non-Indian land from statehood on, but it is unclear as to when the State formalized a policy claiming jurisdiction over Indian lands. At least as late as 1950, the jurisdictional divisions between Federal and State authorities was in doubt.[115] Like many other State intrusions on Indian rights, it appears to have been a process by which the State claimed some degree of authority and the United States silently acquiesced.

With the passage of the Oklahoma Indian Welfare Act in 1936, the tribes gained an opportunity to rebuild their governments. However, the promise of OIWA, just as the promise of IRA elsewhere in Indian Country, has failed to be realized.

Testimony and documents support a conclusion that the Indian people of Oklahoma have suffered unequal treatment at the hands of the State law enforcement agencies. Bob Gann of the Oklahoma Indian Affairs Commission recently concluded a study of arrest and incarceration rates in Oklahoma which indicates that the percentage of Indian arrests as compared to arrests of non-Indians is many times the percentage of Indian population compared to total population in given counties.[116]

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[111] Written testimony of Danny Littleaxe, Chairman, Absentee-Shawnee Tribe, submitted at Oklahoma City hearings.

[112] Oklahoma City hearings, p. 366.

[113] 49 Stat. 1967.

[114] *See* letter dated Nov. 18, 1953, from Governor of Oklahoma to Assistant Secretary of the Interior, Orme Lewis.

[115] *Tooisgah* v. *U.S.*, 186 F. 2d 93 (10th cir. 1950).

A specific example of the disruption indifferent law enforcement can cause an Indian community is the White Eagle area near Ponca City, Okla. This is a community of homes built with moneys furnished by the Department of Housing and Urban Development for the use of Ponca Indians. Testimony indicated that local non-Indians regularly invade the community while drinking and shout, honk car horns, and generally "raise hell." Local law enforcement authorities refuse to respond to calls from the Indian people of the community.[117]

The Riverside Indian School, a BIA boarding school in Anadarko, Okla., recently was the site of a disturbance among the students. Local law enforcement authorities were summoned. The officers on the scene, after the students tipped over a police car, apparently decided they had no jurisdiction and left the scene, leaving the newly constructed Wichita-Caddo-Delaware office building with no protection from the rioting students.[118]

The situation in parts of the State is even worse. In onsite discussions held in Oklahoma, Commission staff members were told that when tribal per capita or lease payments are distributed, the arrest rate rises dramatically. One Indian, when stopped by police, simply endorsed his per capita check and gave it to the police, knowing that, regardless of whether or not he was actually guilty of any crime (which he was not), he would lose the money.

The attitudes of State officials may be seen in a memorandum of law prepared for the Oklahoma Department of Public Safety, and dated May 22, 1975. Under a section entitled "Facts," the memo reads, in part:

> The purpose of this memorandum is to definitively answer that question (of State jurisdiction on Indian land) in order to set a basic Departmental policy. The problem is one growing in importance due to increasing Indian activism through such organizations as the American Indian Movement (A.I.M.).
>
> Initially, Oklahoma Highway Patrol District Headquarters Supervisors were asked to submit a list detailing the Indian-owned property in each county under their supervision upon which trouble with organizations like A.I.M. could most likely occur * * *.[119]

It is hard to decide which is more important to Oklahoma: proper police protection for Indian people or the suppression of A.I.M. The activities of the American Indian Movement in Oklahoma have, to this date, been inconsequential in terms of problems created for law enforcement agencies. The making of a list of areas where "trouble * * * could most likely occur" creates a situation where law enforcement officials tend to presume citizens guilty before they are even accused of a crime, a situation which often leads to excesses.

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[116] Oklahoma City hearings, p. 249.
[117] Ibid., p. 213.
[118] Ibid., p. 336.
[119] Memorandum of Law prepared by Jerry L. McCombs, p. 2.

The treatment of Indians during and after arrest by State and local officials further shows the need for alternative law enforcement agencies. Complaints of police brutality are common from Indians in Oklahoma.[120] A paper by Kathryn Cornell Harris, in 1971, entitled "Indian Police Relations in Rural Oklahoma" (the project was funded by Equitable Life Insurance Co. and a grant from the Law Enforcement Assistance Administration) was prepared for Dr. Gary Marx, professor of sociology at Harvard University. The paper revealed that one of every two Indian families interviewed had a relative who died while in police custody in Oklahoma. Further, this study concentrated on the area around Shawnee, Okla., a town which does not have a bad reputation for relations with Indians.

RESERVATION STATUS

> Historically, legislation that affects Indians is reservation oriented; that is, directed toward Indian people living on Federally-recognized reservations. The Five Civilized Tribes do not come within the scope of many programs and services available to Indians because we do not live on reservations. Our needs, however, are just as great.[121]—Overton James
>
> In one place it says reservation. Great. They are helped. Add a little dash and non-reservation and you are dead. It is words that we are fighting against now.[122]—Levi Stevens
>
> * * * then they took away our reservation status * * * let me say this now; the Poncas did not concur * * *.[123]—Dana Knight

The issue of reservation status is the matter foremost in the minds of the tribal leaders in Oklahoma. It is unclear how many of the tribes came to be considered nonreservations. On the other hand, it is very clear how other tribes came to lose their status. Meanwhile, how the Osage maintained their status as a reservation tribe further confuses the issue.

In this section, we will separate the discussion of eastern Oklahoma (old Indian Territory) and western Oklahoma (old Oklahoma Territory). The final subsection will be devoted to the detrimental effects this change of status has had on the Oklahoma tribes.

1. Eastern Oklahoma

There has never been legislation specifically abolishing the boundaries of the reservations in Indian Territory. When the United States, in the period from 1889 to 1907, stripped the tribes of Indian Territory of most of their powers, and dismantled the governments of the Five Civilized Tribes the intent of the legislation was clear; Congress sought to end the tribal existence of the Indians in Indian Territory.

However, there are still many allotments and a certain amount of tribal land under trust status and subject to the control of the Bureau of Indian Affairs. Case law supporting the contention that the tribes of eastern Oklahoma are still reservations will be discussed in the section on western Oklahoma. The Commission feels that reservation status should be returned to the Five Civilized Tribes and the rest of eastern Oklahoma. Such status does not affect the legal status of the tribe, but rather serves to make the tribes eligible for certain Federal domestic assistance programs from which their present status excludes them.

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[120] Oklahoma City hearings, generally.
[121] Muskogee hearings, May 14, 1976, p. 4.
[122] Oklahoma City hearings, p. 109.
[123] Ibid., p. 203.

2. *Western Oklahoma*

The situation in western Oklahoma is more clear on the issue of reservation status, and reflects a failure on the part of the United States in its role as trustee of the tribes.

Oklahoma Territory prior to allotment was, of course, Indian Country. Controversy arises as to the effect allotment had on its character as Indian Country. (Osage County and the Osage Reservation were included in Oklahoma Territory and will be considered as included in western Oklahoma for the purposes of this section.)

It is unclear how, when, and why the tribes of western Oklahoma with the exception of the Osage, came to be nonreservation tribes. It appears to have come about as a result of conflicting case law. Principle cases involved are *U.S.* v. *Ramsey*, 271 U.S. 467 (1926) affirming Federal criminal jurisdiction over trust allotments within the Osage Reservation; Ex Parte *Nowabbi*, 61 P. 2d 1139 (Okla. 1936), affirming State jurisdiction over crimes on trust allotments within the boundaries of the Five Civilized Tribes; *Tooisgah* v. *U.S.*, 186 F. 2d 93 (10th Cir. 1950) reversing its own earlier opinion and holding that the terms "reservation" and "Indian Country" were not synonymous (at least under the law prior to 1948 when 18 U.S.C. § 1151 defining Indian Country (was enacted); and *Ellis* v. *Page*, 351 F. 2d 250 (10th Cir. 1965) holding that a cession agreement which conveyed all land within a reservation to the United States subject to allotments in severalty to the tribal members effectively disestablished a reservation. In reaching this decision, *Ellis* relied on the 1950 *Tooisgah* decision.

In view of the cession negotiations which preceded the cession agreement, the finding of the 10th Circuit Court of Appeals in *Tooisgah*, supra, may be legally questionable. The court repeatedly stated that allotment constituted "the breaking up of the reservation," and the dissolution of tribal governments.[124] This is simply not the case. The proceedings of the Jerome Commission negotiating the allotment "agreements" between the tribes and the United States shows that the intent of the Act was not to abolish the reservations or take away Indian rights:[125]

> (Commissioner) Sayre. There was one thing I've neglected to tell you that I will now tell you, that this contract shall not affect or take away from you anything that you have by any treaty that you have made heretofore except that you make a relinquishment of your rights to land.
>
> * * * * * * *
>
> Sayre. And the contract that we propose now we want to assure the Indians and we write it down in the contract that it does not affect any rights you may have by treaty or otherwise, they are not affected by this contract.
>
> Robert Burns, Cheyenne. The treaty of 1867 is that still binding?
>
> Jerome. I said it had never been cancelled, it has been carried out,
>
> Sayre. The great father does not want you to move away from this reservation; he wants you to live here just as you live here now only that he desires

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[124] *Tooisgah* v. *United States*, in 186 Federal Register, 2d series, p. 98.
[125] Brief in note 118, p. 53, 54.

> that each man, woman and child shall select a place in the territory where he will live * * *

Congress has never specifically extinguished the reservation boundaries of many of the tribes, and it is not to be assumed that the various allotment acts constituted such an action. Congress knew exactly how to extinguish reservation boundaries, as seen in an Act of April 21, 1904 (33 Stat. 189):

> * * * the reservation lines of said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished; and the territory comprising said reservations shall be attached to and become part of the counties to Kay, Pawnee, and Noble, in Oklahoma Territory * * *.

The Area Director of the BIA Area Office in Anadarko, Okla., recently commented that:

> (W)e would strongly recommend that the tribal lands and individual allotments—the remnants of the original reservations, be referred to in the Bureau of Indian Affairs regulations and official files as reservation lands, denoting the legal effect of such land.[126]

Again, no congressional authorization was given declaring these tribes nonreservations, with only the two tribes named above being exceptions. It was a simple matter of the BIA taking an action for its own convenience. Oklahoma is Indian Country, and the United States has the same responsibilities toward the tribes that it does to Indian tribes in any other State in the Union.

The practical effects on Federal funding as a result of nonreservation status have been to make the tribes ineligible for certain Federal programs involving school construction moneys, title II and title IV of the Comprehensive Employment Training Act, and Law Enforcement Assistance Administration funds. There is absolutely no logical reason why the first two programs should be withheld from Oklahoma tribes, and the reasons for withholding of LEAA funds would seem to be based on legal confusion and administrative fiat. Regardless of whether or not the reservation boundaries still stand, there is no reasonable justification for exclusion of Oklahoma tribes from programs and legislation benefiting the rest of Indian Country.

> The power of the state to impose various forms of taxation on Indian Tribes and individual Indians is limited. The major source of limitation is founded in the trust relationship between the Federal Government and Indian tribes. Other sources of tax immunity are found in the power of the tribe to govern itself and a practical immunity based on a lack of state jurisdiction over Indian lands.—Virgil Franklin[127]

The issues of tribal governments' authority to tax and exemption of tribal government from State taxation are closely linked to the question of jurisdiction and of utmost importance for the tribes in Oklahoma. In practice, the State of Oklahoma has shown little willingness to thoroughly investigate the limitations of its taxing authority over Indian tribes, while the tribes do not have the capacity to conduct such an investigation. The Bureau of Indian Affairs has done little to assist in clarifying the situation, even though it is the principal agent of the trust responsibility to Indian tribes.

The State has in one instance extended an exemption for an Indian tribe on the ground that the tribe is a Federal instrumentality.

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[126] *See* app. 2, exhibit 1, part VIII, Final Report of Task Force No. 9.

[127] Oklahoma City hearings, p. 331.

The State contends that:

> (T)he Federal Instrumentality Doctrine is subject to very strict limitations and should be narrowly defined to allow sales tax exemptions only to those Indian organizations which make purchases solely for the purpose of carrying out a specific economic program for the Indians approved and supervised by the Federal Government, or where such purchases are made with restricted funds.[128]

Again, the State fails to take into account the inherent sovereign character of the Indian tribes. Further, the State has given exemptions to some of the tribes while denying the same exemptions to others. There is no legal or rational reason for the distinction, indicating either that the State is not sure of what its powers are in this area, or that it carries on a "favored status" policy.

At the very least, Congress should declare that tribally owned enterprises be exempted from all forms of taxation from the State of Oklahoma. The tribes are presently delivering more services to many of their members than the State and should be allowed the benefits of tax exemption so that they can improve and expand their delivery of services, for the benefit of Indians and non-Indians alike.

It should be noted that the Five Civilized Tribes are forbidden to levy taxes by the series of enactments discussed earlier. This provision should be repealed. On the issue of tax exemption, however, these tribes are still sovereign units of government, and should be allowed to enjoy the same exemptions enjoyed by other tribes.

TRIBAL MEMBERSHIP

> (L)et the tribes determine their membership and let the Secretary of Interior and whoever else leave those rolls alone.—Mary McCormick[129]
>
> I think that the tribe's right to define its own membership is of utmost importance.—Ross Swimmer[130]

The right to define membership is one of the most basic of any sovereign. This right has been consistently denied to many tribes in Oklahoma. A second important aspect of membership in Oklahoma tribes is that ownership of resources in the same manner as members of a sovereignty should not mean that the owner is therefore a member. Third, movement of a member from the tribal area does not constitute the loss of rights of membership.

One pressing problem regarding population is the distinction made by the Bureau of Indian Affairs between membership and service population. Total membership is defined by the number of names on the tribal rolls. Service population is the number of tribal members living on or near the reservation according to the Bureau of the Census. Tribal leaders consistently complained that census estimates of their service population are ridiculously low. The case of the Absentee-Shawnee Tribe illustrates their problems.

The population for the Absentee Shawnee on or near the reservation is 757 according to the Bureau of Indian Affairs. Recently the tribe did a census showing 1,147 tribal members on the reservation area itself. Near the reservation, there are another 111 tribal members.

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[128] Letter from Oklahoma State Tax Commission to AIPRC, May, 1976.

[129] Oklahoma City hearings, p. 284.

[130] Muskogee hearings, p. 116.

In the State of Oklahoma there are another 402 members, 117 of which reside in Oklahoma City, a mere 30 miles from Shawnee. Therefore a total of 1,258 are on or near the reservation and over 1,600 in the State of Oklahoma. Clearly, the better estimate of tribal population comes from the tribe itself.

Another point of contention is the population count for the purposes of revenue sharing. Whenever tribal members reside in local jurisdictions, even within the reservation, those local communities count these Indians for the purposes of revenue sharing and the tribe cannot. An example is the Absentee Shawnee. The city of Norman and Oklahoma City receive moneys by including tribal members in their revenue sharing formulas, even though tribal leaders contend that their members would prefer to receive services from, be counted in service population formulas for, and even pay taxes to, the tribes.

The Federal Government has often interfered with Indian tribes in Oklahoma. Sometimes the interference is only small and aggravating, such as an order from the Department of the Interior ordering the Sac and Fox Tribes to put an Absentee Shawnee woman on their tribal rolls. Other times, however, Government interference causes a significant amount of problems, especially for the Five Civilized Tribes.

There are two specific problems facing the Five Civilized Tribes: (1) the reliance on the 1907 Dawes Commission rolls as the sole major determinant of tribal membership; and (2) the inclusion of the descendants of the freed slaves of the tribes, as a result of treaties made after the Civil War, on the tribal rolls.[131]

All descendants of those persons on the Dawes Commission rolls are considered tribal members for purposes of voting in tribal elections and referendums, and distribution of judgment moneys. Therefore, many persons of very little Indian blood are allowed to vote in tribal elections, making decisions which may affect their lives not at all, while affecting Indians greatly.

The other membership problem plaguing the Indians of the Five Civilized Tribes is the inclusion of freedmen bands. After the Civil War, the reconstruction treaties of the tribes said that they would provide lands for their freedmen. These freedmen were given allotments which have long since passed into fee simple status. However, the descendants of these freedmen are considered tribal members because of the treaty provisions. It seems strange that the United States has violated almost every provision of those 1866 treaties, yet it holds the Five Civilized Tribes to their word. Again, these people do not identify as Indians, the Federal Government does not recognize them as Indians, yet they make decisions affecting Indians. Clearly, Congress should allow the tribes a method for restricting their membership to persons of Indian descent rather than imposing a Federal definition based on descendancy from the Dawes Commission rolls. The final irony of the situation is that, although the tribes must keep the descendants from the Dawes Commission rolls for tribal political purposes, the Bureau of Indian Affairs provides services only to tribal persons of one-quarter or more Indian blood.[132]

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[131] Muskogee hearings, May 13, 1976, p. 107.
[132] Muskogee hearings, May 13–14, 1976.

Another membership situation of concern in Oklahoma is that of the Osage. The issues involving the Osage are so varied and complex that the major recommendations of the Commission is a special study of their problems. However, it is clear that many Osage Indians received none of the "benefits" of allotment, while many non-Indians continue to reap benefits which could have, and ultimately should have, gone to the Osage Indian people.

TRUST LANDS

> Currently there are 2,100 members enrolled in our tribe. All that remains of our land is 800 acres located 4½ miles south of Stroud, Oklahoma. The land that we once owned, when we arrived in Indian Territory, was 479,668 acres * * *.—Mary McCormick [133]
>
> (I)n our tribe * * * we have 160 acres. We are using quite a bit of that, and we have about 66 acres in cultivation that we are renting out. And we are getting very, very little money. And we don't have any monies whatsoever that our council can go to here and there. We don't have any.—Levi Stevens [134]

The effects of allotment on Oklahoma tribes was devastating. Unfortunately, the problems still exist and there is little evidence that the Federal Government has done anything to alleviate the situation.

When the tribes first arrived in Indian Territory, 90 percent of the present State was in Indian hands. As an example of the diminishment of Indian lands, we concentrated on the effects of allotment in Oklahoma Territory or, roughly, the western half of the State.

When the tribes had all arrived in Oklahoma Territory around 1884, they owned 11,689,443 acres which was to be theirs for all time. Today Indian lands, including tribal trust lands, tribal lands in fee, and trust allotments, total 546,878.93 acres, or less than 5 percent of their treaty lands.[135] Further, all but 22,000 acres of the lands are in individual allotments. In western Oklahoma, each and every tribal leader who was asked if his tribe had enough land replied "no." Even though the Oklahoma Indian Welfare Act (OIWA) specifically authorized the Secretary of the Interior to buy lands through the revolving loan funds in IRA for the Oklahoma tribes and put them in trust, it does not appear that 1 acre of nontrust lands have been put in tribal ownership under the provisions of the Act. No moneys have been appropriated to the Bureau of Indian Affairs Anadarko Area Office for fulfillment of that provision of OIWA.

A breakdown of lands belonging to western Oklahoma tribes and their members appears on p. 532 of this chapter. The chart shows a total of 546,878 acres of land for 22,800 tribal members on the reservation, 47,503 members regardless of location. This means that for each member of a tribe on or near the reservation, there are 25 acres of land in Indian ownership. For each member regardless of location, there are only 12 acres of Indian land. For each individual allotment tract, there are nine tribal members, four on or near the reservation. The tracts average about 95 acres each.

The problems that plague land planning for reservation tribes in other States are present in Oklahoma as well. Checkerboarding and fractionated heirship effectively stifle any long-range economic planning. Further, the lands are poorly protected by the Bureau of Indian

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[133] Oklahoma City hearings, p. 265.
[134] Oklahoma City hearings, p. 116.
[135] See statistical chart on pp 532–33.

Affairs. Take the case of the allotment of a Comanche woman who leased her land through the Bureau for farming purposes. A non-Indian individual was seeking to lease the land, but was on a list of persons to whom the Bureau would not lease because he had acquired a very poor record for payment. The individual's grandchild then entered a bid as a front for his grandparent and was awarded the lease. The grandchild was 17 years old and a high school student with no visible means of support and no collateral. When time came for payment on the lease, the lessee could not pay. Incredibly, the Bureau then extended the lease, supposedly to give the individual time to pay off. Only on Indian land could a person get away with such actions. To date, the situation remains unresolved and a Comanche woman is still waiting for her lease money.

Add to these problems the assertions of tribal leaders that service population figures are much too low, and you see that the tribes have very little chance to become self-sufficient. Moreover, the effect of some State laws is to force still more land into fee status through partition actions as a result of fractionated heirship. Likewise, Indians in Oklahoma are subjected to State probate laws where non-Indians are not, there being no rational basis for this discriminatory treatment. So numerous are the special laws granting the State of Oklahoma special rights over Indians that Felix Cohen devoted a separate chapter to it in his Handbook of Federal Indian Law (see chapter 23).

Finally, few of the tribes have land acquisition and consolidation programs because they simply do not have the resources. Also, the Secretary of the Interior has the authority to place land in trust when it is acquired by the tribes, yet the Department has established a policy that land, generally, will be placed in trust only with specific congressional approval. Three recent examples of this policy are seen with the Absentee-Shawnee, Citizens Band of Potawatomi, and Southern Cheyenne-Arapaho Tribes. All three were awarded lands formerly used by the Federal Government, only to have to pay taxes on the land until Congress acted to have the lands placed in trust. The Comanche and Otoe-Missouria Tribes have begun land acquisition programs using FHA loans, but the trust problem certainly discourages full-scale land acquisition and lessens the returns of such programs.

Therefore, Oklahoma tribes have little, and in some cases, no land to develop even if they had moneys available for economic development.

WATER RIGHTS

> (W)e know that the (Oklahoma State) Water Resources Board either through ignorance or indifference made decisions which are highly questionable and suspect and we inform your office now that corrective action (must) be taken by the State Government to correct the deficiences that have been allowed to exist and grow because of ignorance of the law * * *. We believe that all Indian water rights exist on all major streams within the State of Oklahoma.[136]

Water rights may well be the most important economic asset accruing to the tribes of Oklahoma. As on other issues in Oklahoma, the Bureau of Indian Affairs and the Department of the Interior has refused to take a stance in support of the existence of Indian water rights.

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[136] United Indian Tribes of Western Oklahoma, position paper on water rights.

There is no legal basis for Indian water rights in Oklahoma being distinguished from those of other Indian tribes in other States. The same legal principles apply. The tribes gained, with the establishment of reservations, rights to a sufficiency of water. The Federal Government has made no attempt to quantify the rights of Indian tribes, leaving the tribes no recourse except costly litigation to establish their "prior and paramount" rights to a sufficiency of water.

In eastern Oklahoma, the U.S. Supreme Court ruled, in 1975, that the Cherokeee, Choctaw, and Chickasaw Nations held the rights to the Arkansas River in spite of allotment. One of the factors favoring the tribes was the notion that when the treaties were made with the tribes there was no idea that a State would ever exist in their tribal area.[137] This certainly could apply to all the tribes in Oklahoma, as statehood was never considered for Indian Territory until well after the last reservation was established.

Even if the tribes do not control all the rivers in Oklahoma, they may still hold rights pertaining to the lands they have retained. As with so many other issues in Oklahoma, if State officials would recognize the rights of the sovereign tribes, the problems would not be so severe.

The value of Indian water rights may be seen in the result of the Supreme Court ruling in favor of the rights of the Choctaw, Cherokee, and Chickasaw Nations. The tribes have proposed a settlement of $60 million for lost past rights, and a 99-year lease for $6 million a year.[138] Senator Bellmon of Oklahoma has introduced a bill in Congress that would provide for the Secretary of the Interior to make an agreement subject to congressional approval for the rights to the Arkansas River.[139]

There is a new danger in the area of tribal water rights that is beginning to face the tribes. Oklahoma is attempting to have water rights litigated in Oklahoma State courts. This is very unfair to the tribes who have consistently fared very poorly when States, who are competing for those same resources, are then the forum that adjudicates.

The United States, as trustee of the Indian tribes, must live up to its responsibility to the tribes in defending their water rights. Moneys should be made available to these tribes for litigation costs, and Federal courts are the only appropriate forum for the conflict between the State and the Indian tribes.

TRIBAL GOVERNMENT

> We would strongly recommend that the Bureau of Indian Affairs give full force and assistance to tribes in their desire to remain—maintain full powers and jurisdiction as sovereign nations, specifically in relaton to the states whose boundaries have developed around those of the sovereign nations' boundaries. This should include the following issues but should not be limited to these: land use, taxation powers, hunting and fishing, law enforcement, tribal court system.—Virgil Franklin[140]

Presently, the governments of the Oklahoma tribes simply lack the resources to serve their members adequately. Their budgets are inadequate to deliver the services that governments are obligated to deliver to its constituents. Few of the tribes have even the moneys necessary to establish permanent salaried positions in a number consistent with carrying out even the barest functions of government. Instead, the tribes rely on transitory funding from various Government agencies, funding which they know, from painful experience, cannot be relied upon.

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[137] *Choctaw Nation v. Oklahoma*, supra.

[138] Muskogee hearings, May 14, 1976, p. 33.

[139] S. 3525, June 8, 1976, 94th Cong., 2d sess.

[140] Oklahoma City hearings, p. 331.

The tribes, as explained earlier, have few independent sources of revenue as economic development is nearly nonexistent, and tribal lands, scarce as they are, offer little revenue even when they are developed. The end result of the lack of revenue is a situation where the tribes simply cannot carry out functions vital to their present and future viability.

Further, the Bureau of Indian Affairs has shown itself incapable of adequately defending the resources of the tribes and their members. The Bureau has failed to generate the maximum, or in many cases even an acceptable, rate of return on enterprises and transactions involving tribal resources, particularly leases of tribal or individual lands.

None of the tribal officers in western Oklahoma receive salaries for executing their duties, with the exception of the Cheyenne-Arapaho tribes who pay a nominal sum to their officers. This results often in a situation where tribal leaders are forced to conduct tribal business in what should be their leisure hours. Government simply cannot be effective when its officers cannot devote a sufficient amount of time to Government business.

Therefore, the tribes are forced to rely on funds from various Government agencies. Unfortunately, these funds are not reliable as reapplication must be made periodically with no guarantee of continuous funding beyond a certain period. Moreover, the tribes have found the regulations that go along with the funding are applied in an arbitrary and damaging manner. A specific example is a recent decision of the Office of Native American Programs. Several tribes in Oklahoma were hiring tribal leaders as administrators of programs funded by ONAP. The tribal leaders were, therefore, able to spend a full day in the tribal office and are able to follow and respond to events more rapidly and efficiently. Unfortunately, in June of 1976, ONAP suddenly and, apparently arbitrarily, decided to enforce a rather vague conflict-of-interest clause in grant regulations. It should be noted that each grantee had previously submitted personnel regulations which were approved by ONAP, and in none of the cases involved were the tribal leaders members of the guiding body of the grantee. ONAP, rather than finding a direct conflict of interest involved, is enforcing the decision because of an "appearance of" a conflict of interest. The regulation in no way requires the interpretation it is being given by ONAP.

Another recent development involves directly the advent of P.L. 93–638, the "Self-Determination Act." Prior to enactment of 638, the BIA administered the Tribal Government Development Program (TGDP). However, under the grants portion of 638, tribes are allocated moneys to restructure their governments in order to begin contracting under 638. According to some tribal leaders, the moneys from 638 are less than what they were receiving under TGDP. Further, the tribes cannot use the 638 funds to pay their tribal officers, apparently because of regulations restricting such uses. Clearly, such restrictive guidelines are hurting the tribes, and there is no reason to believe the tribal officials would in any way abuse such funds. It is disappointing that Indian-oriented agencies such as ONAP and BIA would apply the types of guidelines which are useful in non-Indian situations to Indian governments which are simply not to be compared to non-Indian entities.

Another major problem for the Oklahoma tribes is their outdated constitutions. Slightly over half of the Oklahoma tribes are organized under the Oklahoma Indian Welfare Act. The constitutions of these tribes, like those of IRA tribes, appear based on a "model" constitution constructed by BIA. The constitutions are simply inadequate to meet the present needs of the tribes. Congress should do two things: (1) Pass legislation extending all provision of IRA to the Oklahoma tribes, remembering that IRA represented a recognition of the powers of Indian tribes, not a bestowal of such powers; (2) pass legislation allowing for new constitutions for the tribes designed to include all powers necessary to deal with present problems as well as all foreseeable future issues. Presently, Oklahoma tribes are excluded from certain provisions of IRA, including those regarding creation of new reservations and general extension of the trust period, there being no rational basis for such discrimination.

The multitude of promises guaranteeing the territorial integrity of the tribes of Oklahoma have all been broken. The tribal lands guaranteed by treaty a short century ago are now almost entirely occupied by non-Indians. Despite the declarations of honest intent and high principle, the United States has clearly failed to live up to its obligations to the tribes in Oklahoma.

To the great credit of the Indian people of Oklahoma, the tribes persist and strive for the self-sufficiency which was theirs before statehood. Their courage and determination clearly merits better than they have been allowed in this society. But it cannot go on much longer. The tribes must immediately be assisted by the Federal Government, so that they might carry out the necessary functions of government which might guarantee their future viability.

As elsewhere in Indian country, assimilation policies have been a miserable failure in Oklahoma. Indian people are still poor, uneducated, and unhealthy. While some Indian people have "made it" in the non-Indian world which surrounds them, the Federal Government cannot continue to ignore the pitiful situations of Indians in Little Axe, Watonga, Carnegie, Hominy, Anadarko, and the even more rural areas of Oklahoma.

This Commission has listened and cannot help but be impressed by the firm grasp the tribes have to what has to be done. The Creek Nation has submitted to the Commission a very fine, even excellent statement of its problems and what they see as possible solutions. The Creek report provides a plan of action which we believe serves as a giant step toward righting the innumerable wrongs perpetrated against the tribes of Indian Territory by the United States and the State of Oklahoma. We commend the Creek Nation for its efforts which continue the tradition of belief in the American system which has marked the history of the Five Civilized Tribes.

The United Indian Tribes of Western Oklahoma and Kansas have been awarded a grant from the BIA to conduct the survey of their powers and needs which has been needed for years and years. We recommend that this study be considered to the utmost degree in future legislation for the benefit of the tribes of old Oklahoma Territory.

Finally, it is of utmost importance that the Federal Government impress on the State of Oklahoma the nature of the special relationship and responsibility the United States has with and to the tribes of Oklahoma. The tribes want cooperation, not confrontation with the State of Oklahoma. But we stress that this situation has been created by the United States and the State of Oklahoma. It is the Indian people and tribes who suffer for it.

CONCLUSION

Congress should act to reaffirm both the responsibility and relationship of the United States to and with the Oklahoma tribes, as well as the inherent and continuing sovereign character of the Oklahoma tribes. Further, administrative regulations allowing the State of Oklahoma to interfere in this relationship should be rescinded and revised to allow the tribes direct access to the Federal Government, rather than having to go through State authorities. For the tribes of eastern Oklahoma, many more changes are necessary. While it is true that the Government attempted to terminate the Five Civilized Tribes at the turn of the century, it has not and should not complete that process. Therefore, Congress should repeal section 29 of the Act of June 28, 1898, expressing the intent of Congress to end the tribal existence of the Five Civilized Tribes. Further, the Act of June 27, 1897, granting "original and exclusive jurisdiction" to the territorial and later, the State courts, should be amended to allow the tribes a just measure of control over what remains of their tribal domain. Also, the Act of May 8, 1906, terminating Federal jurisdiction over tribal domains and granting it to the State, should be repealed, contingent on approval of the tribes involved. Such actions would serve to protect the tribal domain and allow the tribes to assume control of their destiny once again.

The tribes of Oklahoma should be aided in their desire to assume law and order jurisdiction and assert other legitimate government authority over Indian lands and/or Indian communities in their domain. For the tribes in eastern Oklahoma, the process would take the form of retrocession legislation recommended by the Commission for P.L. 83-280 States. It is critical that the State of Oklahoma understand that this is to be a process, not an event. Such as it is, the protection offered by State law enforcement is better than none at all, and the Indian people of Oklahoma must be protected. As the tribes' capacity of policing tribal lands and other Indian lands in their tribal areas increase, they may, at their discretion, take on increasing police powers as need be. For the tribes of western Oklahoma, the extent of their jurisdictional powers will be largely glorified by the study being conducted by the United Indian Tribes of Western Oklahoma and Kansas. The extent of tribal jurisdiction should be predicated on the tribes' ability to effectively use such powers, and they should increase as the tribes' ability to do so increases. Further, tribal ordinances should be enforceable in State courts until tribal courts are established.

For eastern Oklahoma, the same powers the western Oklahoma tribes have should be returned. Specifically, sections 26 and 28 of the Act of June 28, 1898, should be repealed, thereby making tribal laws enforceable in other courts and returning the power to establish tribal courts to the tribes of old Indian Territory.

Cooperation with the State of Oklahoma is crucial to this process. The tribes are willing to discuss problems with the State. The State must begin to see tribal entities as friends, rather than threats, so a better situation results for all.

Finally, there is no logical reason why BIA police officers should not be present, at least in western Oklahoma. Indian people are poorly protected in Oklahoma, and the fact that the BIA has failed to improve the situation reflects a violation of the Federal Government's duty to protect Indian people and property. BIA police should be a part of tribal law enforcement programs at the request of the tribes.

RECOMMENDATIONS

The Commission recommends that:

1. It is the conclusion of the American Indian Policy Review Commission that the findings and recommendations applicable to Indians generally are part of the Federal-Indian policy and are equally applicable to the Indian tribes and people of Oklahoma without distinction and that no tribe or community of Indian people should be denied the benefits or advantages of Federal-Indian law or policy solely because they are found within the boundaries of the State of Oklahoma.

2. Congress repeal those laws which presently restrict or remove from the tribes of Oklahoma the full measure of jurisdictional and governmental powers enjoyed by other tribes in States unaffected by Public Law 83–280. To the extent that the State of Oklahoma lawfully exercises jurisdiction over Indians on Indian lands at present that jurisdiction should remain as concurrent with the tribal powers, pending the assumption of full jurisdiction by the tribes.

3. For those tribes found lacking an adequate legal base for present assertion of tribal governmental powers, Congress provide by appropriate legislation for the reassumption of Federal jurisdiction and tribal jurisdiction to the exclusion of State jurisdiction adhering to the following principles:

   a. Reassumption of Federal jurisdiction and tribal jurisdiction to the exclusion of State jurisdiction be to the same extent as are found on reservations in States not presently exercising Public Law 83–280 jurisdiction or other jurisdiction pursuant to special jurisdictional statutes for that State.

   b. The extent and limitations, including any timetables for partial or total assumption of jurisdiction be at the option of the tribe which shall prepare a plan for same.

   c. There be direct financial assistance made available to the tribe or intertribal group which includes a Secretarial designation necessary to qualify for LEAA discretionary funds. LEAA Act also be amended and directed to make funds available for planning and preparation prior to assuming law and order functions.

d. The plan presented by the tribe or intertribal group reflect consultation with State and local governments concerning transition activities and to reflect cooperation or lack thereof. State and local governments shall have no veto over the plan.

e. The plan be presented to the Secretary who shall:

(i) Act within 120 days to approve or disapprove the plan, and failure to act within that time shall be considered approval;

(ii) Base disapproval of the plan solely upon the basis of the inadequacy of the plan giving specific reasons and providing technical assistance and resources necessary to meet the inadequacies where possible.

(ii) Within 120 days after the passage of the Act, the Secretary shall draft standards for determining the adequacy or inadequacy of a tribal plan, which standards shall be sent to the individual tribes of Oklahoma who shall have not less than thirty (30) days to prepare comments on the standards proposed by the Secretary. The Secretary shall submit to Congress within 200 days after passage of the Act the proposed standards with tribal comments.

f. Rejection of a tribal plan by the Secretary shall be appealable to a three-judge district court in the District of Columbia, and the Department of the Interior shall pay all reasonable attorneys fees and costs of the tribe or intertribal group as determined by the Federal court except where such appeal is deemed to be frivolous.

STATISTICAL CHART ON WESTERN OKLAHOMA TRIBES

Tribe	Agency	Population [1] Total membership	Population [1] On or near original reservation	Organization [1]	Tribal and alloted land [1]	Original reservation acreage (approximate)
Absentee Shawnee	Shawnee	1, 543	757	Constitution and bylaws adopted: 1938 OIWA.	Acres trust, 37; acres fee, 33; individual allotments, 214; tracts totaling 13,444.47.	Potawatomi Reservation—588,567 acres [2] (occupied by Absentee Shawnee and Citizen Band of Potawatomi Tibes).
Apache	Anadarko	1, 000	500	Constitution and bylaws adopted: 1972 OIWA.	Acres trust, 5,341; acres fee, 0; Individual allotments, 2,395; tracts totaling 240,509 acres.[3]	Kiowa, Comanche, and Apache Reservation 2,969,000 acres [2] (occupied by Kiowa, Comanche, and Apache Tribes).
Caddo	do	2, 116	1, 200	Constitution and bylaws adopted: 1938 OIWA. Charter adopted: 1938 OIWA.	Acres trust, 2,309; acres fee, 0; Individual allotments, 670; tracts totaling 67,048 acres.[4]	Wichita Reservation—743,610 acres [2] (occupied by the Caddo, Delaware, and Wichita Tribes).
Cheyenne-Arapaho	Concho	6, 674	5, 005	Constitution and bylaws adopted: 1937 OIWA.	Acres trust, 5,873; acres fee, 4,000; Individual allotments, 900; tracts totaling 97,000 acres.	Cheyenne and Arapaho Reservation—4,297,771 acres. [5]
Iowa of Oklahoma	Shawnee	276	70	Constitution and bylaws adopted: 1937 OIWA, Charter adopted: 1938 OIWA.	Acres trust, 12; acres fee, 0; Individual allotments, 43; tracts totaling 1,509 acres.	Iowa Reservation—228,418 acres.[6]
Kaw	Pawnee	250	130	Govern under BIA—approved resolution.	Acres trust, 20; acres fee, 0; Individual allotments, 0; tracts, 0.	Kansas or Kaw Reservation—100,141 acres.[7]
Kickapoo of Oklahoma	Shawnee	1, 106	553	Constitution and bylaw sadopted: 1937 OIWA Charter adopted, 1938 OIWA.	Acres trust, 17.5; acres fee, 0; Individual allotments, 120; tracts totaling 6,128 acres.	Kickapoo Reservation—206,466 acres.[8]
Kiowa	Anadarko	7, 000	3, 500	Constitution and bylaws adopted: May 23, 1973.	Acres trust, 5,341; acres fee, 0; Individual allotments, 2,395; tracts totaling 240,509 acres.[3]	Kiowa, Comanche, and Apache Reservation—2,969,000 acres [2] (occupied by Kiowa, Comanche, and Apache Tribes.)

Osage	Muskogee Area Office.	([9])	([9])	Principal chief and 8-member tribal council. Act of June 28, 1906, 24 Stat. 539, sec. 9.	Acres trust, 645; individual allotments, 0; tracts totaling 216,994 acres.	Osage Reservation—1,470,058 acres.[8]
Otoe-Missouria	Pawnee	1,425	980	Constitution and bylaws adopted: None. Governed by business committee.	Acres trust, 1,400; acres fee, 0; individual allotments, 256; tracts totaling 26,156 acres.	Otoe Reservation—129,113 acres.[10]
Pawnee	do	2,188	1,085	Constitution and bylaws adopted: Jan. 6, 1938 OIWA. Charter adopted: Apr. 28, 1938.	Acres trust, 680.57; acres fee, 0; individual allotments, 342; tracts totaling 24,695.39 acres.	Pawnee Reservation—283,02 acres.[7]
Ponca	do	1,983	1,580	Constitution and bylaws adopted: Sept. 20, 1950 OIWA. Charter adopted Sept. 20, 1950, OIWA.	Acres trust, 932.46; acres fee, 2.35; individual allotments, 201; tracts totaling 16,219 acres.	Ponca Reservation—101,984 acres.[11]
Sac and Fox of Oklahoma	Shawnee	2,020	600	Constitution and bylaws adopted: 1937 OIWA.	Acres trust, 805; acres fee, 0; individual allotments, 223; tracts totaling 18,406 acres.	Sac and Fox Reservation—479,668 acres.[12]
Tonkawa	Pawnee	90	40	Constitution and bylaws adopted: 1938 OIWA.	Acres trust, 160.50; acres fee, 0; individual allotments, 10; tracts totaling 320.74 acres.	Tonkawa or Oakland Reservation—90,711 acres.[8]
Wichita	Anadarko	819	600	Constitution and bylaws adopted: None. Governing resolution adopted May 1961.	Acres trust, 2,309; acres fee, 0; individual allotments, 670; tracts totaling 67,048 acres.[4]	Wichita Reservation—743,610 acres[8] (occupied by the Caddo, Delaware, and Wichita Tribes).
Total		[13] 47,503	[12] 22,080	Acres trust, 18,234.28 (includes Osage); acres fee, 4,295.35; Individual allotments (except Osage), 5,512; tracts totaling 524,349.30 acres.		13 reservations totaling 11,689,443 acres.

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[1] Tribal Directory, Anadarko Area Office, Bureau of Indian Affairs (1975).

[2] Annual Report of the Commissioner of Indian Affairs 462–463 (1906).

[3] Tribal and allotted acreage of the Kiowa, Comanche, and Apache Tribes is recorded together.

[4] Tribal acreage of the Caddo, Delaware, and Wichita Tribes is recorded together. Allotted acreage of the Caddo and Wichita Tribes is also recorded together: allotted acreage of the Delaware Tribe is separately recorded.

[5] Annual Report of the Secretary of the Interior 14 (1885).

[6] Annual Report of the Secretary of the Interior 28 (1980).

[7] "Message on Surveys in the Indian Territory," Senate Ex. Docs. No. 32, 45th Cong., 2d sess. (Feb. 20, 1878).

[8] Annual Report of the Secretary of the Interior, V (1891).

[9] Not available.

[10] Order of the Secretary of the Interior, June 25, 1881, I Kappler 844.

[11] Act of Mar. 3, 1881, 21 Stat. 422, I Kappler 191.

[12] Annual Report of the Secretary of the Interior, VIII (1891).

[13] Excluding Osage.

C. CALIFORNIA

INTRODUCTION

The Indian experience in California, although similar on some levels to that of tribes elsewhere, has several unique components. The colonizing process followed by Spain (and later Mexico) culminated in the mission system. Its impact on the indigenous tribes was pervasive. When the United States acquired the California territory, Spain's land grants to the various tribes were never investigated, and seldom confirmed; substantial land losses resulted.

Contemporary American policy has also had a substantial adverse impact on Indians in California. The termination era singled out California Indians, wiping out the Federal status of over 60 small tribes. Relocation, another policy thrust of the era, stimulated migration of Indians from reservations all over the United States to the urban employment centers of California. The original focus of Public Law 83–280, likewise, was on California. The impact of these policies is still felt in the inequitable allocation of Federal Indian money to California Indians. Another result of these policies is that a large number of Indians, possibly as many as 50,000, residing in California today are not considered by the Bureau of Indian Affairs or other agencies as part of their Indian service population.

The problems of Indians in California cover the entire range of problems identified in other chapters of this report. The Indians in California share, in common with their brothers in other States, the problems of urban Indians, rural landless Indians, Indians whose tribes have been terminated, Indians whose tribes have never been recognized, issues related to Public Law 83–280, and the special problems of small tribes in obtaining adequate Federal allocation of resources and qualification for Federal programs. The recommendations made in other parts of this report apply equally to the Indians in California.

A special problem, unique to the California Indians, relates to the inequitable budgetary process used by the Bureau of Indian Affairs and the Indian Health Service in allocating funds for programs for Indians in that State. The principle focus of this chapter on California Indians is on this budgetary disparity with recommendations for revision of the allocation formula to correct this imbalance.

HISTORICAL PERSPECTIVE

In 1542, recorded contact was made with California Indians by Spanish "explorers." Subsequently, the land and its inhabitants were claimed for Spain under the international doctrine of "discovery." Colonization of this area began in 1769 with the establishment of the first mission at San Diego de Alcala.

In 1822, the Spanish-Mexican influence increased and power over the extensive land mass was converted into the lands of the wealthy who were primarily of European descent.[141]

In the early years of development in this Mexican colony, 21 large missions were established with the imposition of Spanish law. The law stated that all lands were to be held in trust by the Crown and that the Indian population was to be utilized in a "serf" capacity upon any land owned by the nobility. In addition, the law of "congregaciones" provided that the Indians were to be assembled into permanent evangelical groups for the purpose of a forced labor supply. Ultimately, this provided an easy method for obtaining Indian land. The Spanish missions remained the dominant force behind Indian slavery until 1836 when the Governor declared that each mission was to be "secularized," or turned into Indian towns.

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[141] Forbes, Jack D., Native Americans of California and Nevada, a Handbook (Healdsburg, Calif.: Naturegraph Publishers, 1969), p. 38.

The "mission" period will be remembered as the period which produced the greatest and most startling changes in Indian life. Attracted in the beginning by promises of new ways of living and agricultural tools, many Indians flocked to the missions. Soon, the initially scattered huts around the mission became included in stockades where the freedom to travel was confined to the inner walls. It was this "mission" period, lasting approximately 60 years, which brought disease, famine, and pestilence to those who resided in or near the missions.[142] In northern California during this time, European expansion was kept to a minimum and, with the exception of light trading with Russia, the area was kept feudal free.

The United States war with Mexico ended in 1848 and with it the cession of California to the United States by the Treaty of Guadalupe Hidalgo. One of the significant provisions in the treaty was that the United States agreed to preserve and recognize lands which were then inhabited by Indian people. During the time from cession in 1848 to the year 1900, the Indian population of California dwindled from approximately 200,000 to 15,500.[143] In 1848, with the discovery of gold, settlers and miners came to California by the thousands to prospect and farm with the secondary purpose of denying any Indian the use or occupancy of any land with a trace of mineral value. Out of this migration grew legislative pressure on the county courts to assume control over Indians whereby the slightest infraction could result in an Indian being auctioned off to the highest bidder as an indentured slave until his fine was adequately settled.

Recognizing the increasing economic significance of the burgeoning State of California, President Fillmore appointed three Federal commissioners to negotiate with the Indians in an attempt to extinguish any remaining claims to title of their land. The three commissioners were sent to California to negotiate with 402 Indian chiefs. After the completion of the treaties, various legislative requests were made to the State and Federal governments asking that the Indians be removed from the jurisdiction of the State. Even though the Commissioner of Indian Affairs at that time was a large landholder from California, this attempt was unsuccessful. The negotiated treaties were submitted to the United States Senate for ratification but they were not acted upon.

Treaty provisions which had not been legally ratified were, nevertheless, enforced in California. The Indians of California, however, were not aware or informed that these treaties were not legally enforceable. Later, the documents were "lost" to time and were not again recovered until 1905.

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[142] California Historical Society Quarterly: Sept., 1945, pp. 229–31.

[143] Kroeber, A. L., Handbook of the Indian of California (Washington, D.C.; Government Printing Office, Smithsonian Institute, Bureau of American Ethnography, Bulletin 78, 1925), p. 891.

It is not of secondary importance to note that non-Indian Californians, at one time, conducted "Indian hunts" whenever they "suspected" the threat of Indian aggression and, coincidentally, in areas which they suspected had mineral wealth.

In 1851, the Land Registration Act was passed to ascertain and confirm private land claims in California. Most Indians at that time were illiterate and, furthermore, were never informed of the Act, so their title to land could not be asserted, and was not recognized. In further denial of Indian title claims, the Act declared that all public lands were to be surveyed and preemptive rights to the land were to be accorded to all non-Indian settlers. One must also be aware that during the passage of this Act, California Indians were not accorded any legal recourse to challenge the taking of their lands.

In 1875, after the gold rush, Executive order reservations were established in the State, forcing Indians to locate in confined areas near the boundaries of the State.

In 1890, after the maximum loss of Indian land, Congress passed the Mission Relief Act which was designed to provide small parcels of generally poor land to southern California Indians.

Congress, in 1928, enacted a law permitting the Indians of California to bring their actions to the U.S. Court of Claims. Recovery, however, was limited to compensation which was to have been provided for lands which were to have been set aside for Indian reservations under unratified treaties. The attorney general of California brought the action and recovered $17 million, of which $5 million was returned to the government as administrative setoff for goods and services which it claimed it previously provided to the Indians. In 1939, another California attorney general, Earl Warren, attempted to reactivate the case through litigation and failed.

In 1959, the Indian Claims Commission (established in 1946)[144] issued an order directing that the Indians of California be compensated for the 64 million acres of land that were taken from them illegally. In 1964, the negotiated settlement was finalized in the amount of $29.1 million or approximately $400+ per acre. The distribution of that judgment was made in December 1972, to 64,370 Indians who are descendants of the original dispossessed California Indians.

DEMOGRAPHY

As one would expect from the historical overview, there are at least five identifiable classes of Indian people in California: (1) urban Indians experiencing the special problems related to receiving social services from urban communities and the Federal Government; (2) potential landless Federal rural Indians excluded from Federal social services on grounds they have no reservation land base; (3) tribes with which the Federal Government terminated relations; (4) unrecognized tribes; and (5) reservation land based tribes. The following analysis is principally directed at this last group.

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[144] 25 U.S.C.A. § 70.

The exact count of the number of Indians in California varies considerably. The Bureau of Census, with acknowledged undercount, places the figure at approximately 60,000. State of California estimates 85,000. Other sources would place the number in excess of 100,000. According to the census, California has the third largest population of Indians among the States. All sources agree that the majority of the California population resides in urban areas. The census classifies 76 percent of the Indian population in California as urban.

ALLOCATION OF FEDERAL RESOURCES

Bureau of Indian Affairs

In contrast to these population figures, the Bureau of Indian Affairs estimates its service population at 36,255. This figure is based on the number of Indian people who are (1) members of federally recognized tribes and (2) are living within the State. Otherwise stated, the count is based on the number of Indians living within counties containing trust land. The majority of this land is located in rural areas and has little potential for economic development.

Most of the tribes have small resident populations. In 1973, the Bureau of Indian Affairs estimated the total "on reservation" resident Indian population to be 6,240.[145] The fact that this estimate was made in the context of a general survey of Indian labor status suggests the possibility that this figure (6,240) may be used by the BIA in other subject areas involving allocation of Federal funds to California Indians.

Whatever the reasons, it is clear from BIA budget data since 1969 that federally recognized California Indians have not been receiving a fair share of the total BIA allocation of appropriated funds. The BIA recognizes a service population of 36,255 Indians in California and uses this figure in its appropriation requests to Congress. This amounts to 6.7 percent of the total BIA service population nationwide. However, since 1969, the total allocation of appropriated funds to California has ranged between 0.8 percent to a high in fiscal year 1977 to 2.2 percent. In fiscal year 1977, Indians served by the BIA Sacramento Area Office will receive a per capita allocation of $304.70 compared with a per capita national average of $936.21. (See tables I and II.)

The BIA does not use any fixed formula for allocation on the basis of population. Each program of BIA is evaluated on its own terms and not all programs pertain equally to all areas. Programs such as timber management, range conservation, etc., may require allocation of funds to one area which are not appropriate to another, and this clearly would be true in the context of California. However, service population does figure heavily in many people-oriented program allocations. And it is clear that the disparity in allocation to California Indians cannot be justified in terms of service population or in terms of stated needs.

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[145] Estimate of resident Indian population and labor force status, prepared by BIA, 1973.

It has been noted that California Indians were singled out in the 1950's for termination of Federal relations (some 60 small tribes were affected) or for inclusion under Public Law 83–280. It is believed that the resources of this period led the BIA to adopt a policy undercounting its true service population in that State.

While the policies of termination have now been abandoned, the budgetary system of the BIA has not allowed for a corrected evaluation of the service needs of these people. The BIA computes current budgets by using past budgets as data bases. Rather than significantly reevaluating allocations each year, the BIA relies on past allocations to determine current ones. Area offices which are underfunded in one fiscal year are likely to be underfunded in subsequent years. The result has been that while Sacramento Area's share of the total budget has increased somewhat from 1969, it has not increased sufficiently to reach an equitable level.

In fiscal year 1977, the BIA budget provided for the first time an experimental "equity adjustment" for underfunded agencies. All agencies received a standard 1.6 percent allocation increase, but those agencies selected to participate in the "equity adjustment" received an additional 6.4 percent, making a total 8 percent increase. The Southern California Agency in the Sacramento area was selected to participate in this program, but the Hoopa and Central California Agencies were omitted. Even for Southern California Agency, 6.4 percent was hardly enough to alter radically the present unbalance. Nevertheless, it appears that the BIA considers that the "equity adjustments" were "ill-received" and may not be continued.[146] Clearly, an "equity adjustment" is mandatory for the California Indians. The programs listed in table III serve Indians living on and off reservations and rancherias, or a service population of 36.255 which includes all rural Indians living within countries containing trust land. As can be seen in table IV, the Sacramento Area fiscal year 1976 allocation consists of funds expended to serve the larger service population of 36.255. Tables V and VI demonstrate that even for those programs which serve Indians living on and off reservations or rancherias, the Indians of California are severely underfunded.

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[146] Letter of Department of Housing and Community Development, State of California to Congressman Sidney Yates dated Apr. 18, 1977.

TABLE I.—TOTAL FEDERAL BIA OUTLAYS AND SACRAMENTO AREA ALLOCATIONS 1969-77[1]

[Dollar amounts in thousands]

	Total outlay of Federal funds for BIA nationwide	Sacramento area allocation	Percent of total BIA funds allocated to Sacramento area
Fiscal year:			
1969	$263,094	$2,005	0.8
1970	302,745	2,472	.8
1971	364,508	3,938	1.1
1972	439,685	5,810	1.3
1973	514,866	9,924	1.9
1974	583,838	9,413	1.6
1975	691,317	10,949	1.6
1976 [2]	867,601	11,166	1.3
1977 [3]	508,265	11,047	2.2

[1] Figures obtained from the office of the Sacramento area director and from Federal Budget data.

[2] Current year figures. Totals are tentative since the program year is not yet completed. The figure for the Sacramento area does not include carryovers from fiscal year 1975. With carryovers, this year's expenditures will probably total $11,482,900.

[3] The projected allocation for Sacramento does not include the following budget items since proposed allocations for such items have not as yet been made: Aid to public schools, law enforcement, road construction, irrigation and power construction, school operations. Only partial allocation, as yet, has been proposed for aid to tribal governments. Funding levels under that item for comprehensive planning, tribal government development, and agricultural extension services have yet to be proposed. Assuming that the above items are funded at least at current levels, the proposed allocation for Sacramento should approximate $13,403,300 plus. The National BIA total also does not include the budget items listed above. The fiscal year 1977 estimate including such items is $816,400,000. That figure covers funding from October 1976 through October 1977 since the Federal Government is shifting from a July to July fiscal year. The period of July 1976–October 1976 will be covered by a special appropriation of $242,712,000. California's estimated $13,398,500 plus would account for only 1.6 percent of the estimated fiscal year 1977 total funds.

TABLE II.—PROPOSED FISCAL YEAR 1977 BIA BUDGET BY AREA AND SERVICE POPULATIONS[1]

[Dollar amounts in thousands]

Area ranked by size of allocation	Proposed allocation	Percent of total allocation	Population on or near a reservation[2]	Percent of total population
Navajo	$123,523.4	24.3	[3] 129,976	23.9
Phoenix	78,730.1	15.5	50,879	9.4
Portland	55,258.2	10.8	25,305	4.7
Aberdeen	51,100.5	10.1	48,846	9.0
Juneau	41,333.6	8.1	61,026	11.2
Albuquerque	36,450.1	7.2	34,952	6.4
Muskogee	31,876.5	6.3	62,538	11.5
Billings	27,747.1	5.3	30,640	5.6
Anadarko	23,279.6	4.6	23,713	4.4
Eastern	12,849.8	2.5	10,095	1.9
Minneapolis	12,591.3	2.5	22,052	4.1
Sacramento	11,047.4	2.2	36,255	6.7
Navajo-Hopi	2,477.7	.5	[3] 6,710	1.2
Total	508,265.3	100.0	542,897	100.0

[1] Budget figures do not include proposed allocations for the following programs: Aid to public schools, school operations, law enforcement, road construction, irrigation and power construction. Only partial allocation has been proposed for aid to tribal governments.

[2] Population figures are based on June, 1973 data produced by the BIA. Mr. Conger, the Bureau's chief statistician, stated that such data was the most current. The 36,255 figure for the Sacramento area represents the total number of Indians living in the 34 counties which contain trust land. Figures for other areas may be high because figures reported by some reservations include tribal members who are no longer residents. Source for data: "Estimates of Resident Indian Population and Labor Force Status," BIA, June, 1973.

[3] BIA documents from which this data was obtained included "Navajo-Hopi" as an "area" for the purposes of receiving BIA allocations for fiscal year 1977. The population of 6,710 is equal to the figures shown for the Navajo-Hopi Agency in the document "Estimates of Resident Indian Population and Labor Force Status," BIA, 1973. That figure was included within the Navajo area population of 136,686, which appears in the above mentioned document. The Navajo figure shown on this table, 129,976, excludes the Navajo-Hopi population estimates. Although the Navajo-Hopi Agency is listed as a separate "area" on the table, it is in fact an agency within the larger Navajo area. (To compute Navajo population shown: 136,686 minus 6,710 equals 129,976.)

TABLE III.—FUNDS ALLOCATED TO SACRAMENTO AREA FOR PROGRAMS SERVING INDIANS ON AND OFF RESERVATIONS, FISCAL YEAR 1975–76 [1]

[Dollar amounts in thousands]

Programs serving Indians on and off the reservation	Fiscal year 1975	Fiscal year 1976 [2]
Education and training, general	$26.2	$37.7
School operations	2.5	4.8
Aid to public schools	387.7	350.0
Career development	2,905.0	2,764.9
Aid to tribal governments [3]	473.6	609.1
Social services	83.0	109.1
Law enforcement	31.4	30.0
Housing	545.4	627.7
Business development grants	474.2	230.0
Direct employment assistance	1,436.6	1,141.9
General management and facilities [4]	324.4	452.4
Loan guaranty and insurance fund	13.9	138.7
Administrative support [4]	468.8	468.8
Total	7,172.7	6,965.1

[1] The programs listed are those which, according to Sacramento area director, William Finale, serve Indians living off reservation as well as those on trust land. This service population is estimated at 36,255.

[2] All fiscal year figures are tentative since the program year is as yet incomplete.

[3] Tribal governments have responsibilities which extend beyond trust land boundaries and, accordingly, Federal funding under this item directly affects off-reservation Indians.

[4] Both general management and facilities and administrative support items are included in this tabulation because both functions are necessary to continuance of programs designed exclusively for on-reservation Indians and programs serving both on- and off-reservation Indians.

TABLE IV.—PERCENT OF TOTAL FUNDS ALLOCATED TO THE SACRAMENTO AREA EXPENDED FOR PROGRAM SERVING BOTH ON AND OFF RESERVATION INDIANS (36,255 SERVICE POPULATION), FISCAL YEAR 1975–76

[Dollar amounts in thousands]

	Amount allocated for programs serving on and off-reservation Indians	Total amount allocated	Percent of total serving on and off res. Indians
Fiscal year:			
1975	$7,172.7	$10,949.0	65.5
1976	6,965.1	11,166.0	62.4

TABLE V.—FUNDS ALLOCATED TO SACRAMENTO AREA OFFICE VS. TOTAL BIA FUNDS AVAILABLE FOR SELECTED PROGRAMS SERVING CALIFORNIA INDIANS BOTH ON AND OFF RESERVATION, FISCAL YEAR 1975 [1]

[Dollar amounts in thousands]

Selected programs serving both on and off reservation Indians service population 36,255 [2] (estimated)	Fiscal year 1975 amount allocated to Sacramento area	Fiscal year total amount available to all areas	Percent of total amount available allocated to Sacramento area
School operations	$2.5	$143,747	0.002
Aid to public schools	387.7	28,352	1.4
Career development	2,905.0	54.396	5.3
Aid to tribal governments	473.6	11,322	4.2
Social services	83.0	63,963	.1
Law enforcement	31.4	10,115	.3
Housing	545.4	13,203	4.1
Indian business development grants	474.2	10,000	4.7
Direct employment assistance	1,436.6	14,107	10.2

[1] Figures obtained from budget data of Sacramento area office and from Interior Department budget estimates for Bureau of Indian Affairs.

[2] Service population estimates obtained from June 1973 statistical data produced by the BIA.

TABLE VI.—FUNDS ALLOCATED TO SACRAMENTO AREA OFFICE VS. TOTAL BIA FUNDS AVAILABLE FOR SELECTED PROGRAMS SERVING CALIFORNIA INDIANS BOTH ON AND OFF RESERVATION, FY 1976[1]

Selected programs serving both on and off reservation Indians service population 36,255[2] (estimated)	Fiscal year 1976[3] amount allocated to Sacramento area	Fiscal year total amount available to all areas	Percent of total amount available allocated to Sacramento area
School operations	$4.8	$147,539	0.003
Aid to public schools	350.0	27,952	1.2
Career development	2,764.9	54,679	5.0
Aid to tribal governments	609.1	11,997	5.1
Social services	109.1	66,189	.2
Law enforcement	30.0	24,500	.1
Housing	627.7	14,310	4.4
Indian business development grants	230.0	10,000	2.3
Direct employment assistance	1,141.9	14,021	8.1

[1] Figures obtained from budget data of Sacramento area office and from Interior Department budget estimates for Bureau of Indian Affairs.

[2] Service population estimates obtained from June 1973 statistical data produced by the BIA.

[3] Figures are estimates since fiscal year 1976 program year is not as yet completed.

Note: Tables I to VI taken from California Department of Housing and Community Development report.

Indian Health Service

Budgetary data from the IHS has not been compiled with the same detail as that for BIA. However, figures available indicate that IHS funding for California Indian services are equally out of balance for service population and need.

The Indian Health Services allocates only about 1 percent of its resources to health care for California Indians. (The national Indian Health Services appropriation is $239,424,000; California's assigned share is $2,727,000). Of 510 IHS doctors, only three are serving California Indians; of 1,089 nurses, California has only eight; and of the 8,000 total IHS employees, only 45 are assigned to California. Were California Indians living on reservations to receive funding on a per capita basis, they would be entitled to at least $16,041,408 as opposed to the $2,727,000 they presently receive.

RECOMMENDATIONS

Recommendations made throughout this report are equally applicable to the Indian tribes and Indian people of California. Recommendations made in other chapters which have particular pertinence to California are as follows: (1) special financial needs of small tribes covered in chapter 5; (2) amendment of Public Law 83-280 to facilitate retrocession of jurisdiction; (3) delivery of services to urban Indians and rural landless Indians covered in chapters 8 and 9; and (4) restoration of terminated tribes and recognition of previously unrecognized tribes covered in chapters 10 and 11.

The record reflects that there is disparity in the present allocation of funds by the BIA and IHS to California Indians. Indians in other States with a significant number of landless Indian tribes, such as Michigan, may also be affected.

The Commission recommends that:

1. The Bureau of Indian Affairs be directed to review its past allocation of funds among its service areas to determine whether Indians

in all of its service areas are receiving equivalent services. In those service areas where significant underfunding and/or disparity in allocation has occurred, immediate "equity adjustments" be made.

2. The system of using past budgets as a data base to establish either floors or ceilings on current or future budgets not be rigidly enforced. This is particularly true in those areas where past budgets have failed to properly provide for the needs of its service population.

3. The Indian Health Service review its service delivery to Indians in California to determine whether its service population in California is receiving health care equivalent to that of Indians in other areas.

4. Congress require each of these agencies to report on their findings regarding past inequities in fund allocations among their different service areas and require each agency to specify the procedure it will follow in future budget developments to avoid repetition of this occurrence.

D. Land Claims and Aboriginal Ownership

PASSAMAQUODDY AND PENOBSCOT CLAIMS

The largest land claim ever brought by Indians in a Federal court may soon be litigated in the Federal District Court for the District of Maine.

The claims of the Passamaquoddy Tribe and the Penobscot Nation involve in excess of 10 million acres of land within the State of Maine. The lands in question were taken by the State of Massachusetts pursuant to treaties dating from 1794. When Maine secured independence in 1820, its articles of separation assumed any obligations that Massachusetts owed to the Indians by treaty or otherwise.

The claims of the tribes are founded on the Indian Trade and Intercourse Acts enacted in 1790 and periodically reenacted by later Congresses. These Acts are often referred to as Non-Intercourse Acts. The Non-Intercourse Act of 1790 and its later successor legislation provided that no purchase, grant or other conveyance of Indian land should be of any validity unless the transaction be made and executed under the authority of the United States.

Litigation

In 1972, the Passamaquoddy Tribe asked the United States Department of the Interior to bring suit against the State of Maine under the Non-Intercourse Act. The Department of the Interior refused on the grounds that it owed no trust obligation to the tribe, and the tribe sued the Federal Government challenging that refusal. Shortly after suing the United States Government the tribe obtained a court order requiring the United States to sue Maine, so that the statute of limitations might not run out on the tribes' claims. These suits, one on behalf of the Passamaquoddies and one on behalf of the Penobscots, seek only monetary damages in the total amount of $300 million. They do not seek return of land.

In 1974, the United States District Court for the District of Maine rendered a decision holding that the Passamaquoddy Tribe of Indians was a tribe within the meaning of the Non-Intercourse Act of 1790 and its successor legislation. This decision was affirmed by the First Circuit Court of Appeals for the United States in 1975. The Department of Justice was not ordered to bring suit on behalf of the tribe, but it was told that it could not premise its refusal to represent them on the theory that the Passamaquoddy and the Penobscot were not Indian tribes. As a consequence of this litigation, the Department of the Interior reevaluated the case and requested the Department of Justice to bring action on behalf of the tribes.

On February 28, 1977, the Justice Department filed a motion in the case of *United States* v. *Maine* asking for more time until June 1, 1977, to file its formal complaint on behalf of the two tribes. This motion outlined the claims which it proposed to file on behalf of the tribes. As outlined, the proposed claim would eliminate highly populated coastal areas and would take into consideration the special problems of small individual land owners. Land claims described would amount to approximately 40 percent of the State land mass. The bulk of these lands are held in ownership by a small number of individual families and large corporations.

The Department of the Interior originally asked Justice to pursue 10 million acres of land. Of the 10 million acres in the claim area, an estimated 3 million acres are presently occupied by towns, business, and private residences. The balance of the land is unoccupied and largely held in private ownership by a few large paper companies. A small portion of the unoccupied lands (7–10 percent) is owned by the State of Maine. A negligible amount is held by the Federal Government. Interior has now modified its request for litigation in agreement with the Passamaquoddy and Penobscot Tribes and is asking Justice to file for claims on lands actually used and occupied by the tribes as of 1790. The modified claim would not include the coastal areas settled or the lands granted as of 1790. This would exclude from the present claim significant areas of population where there are numerous individual homes.

The position of the Department of Justice, as agreed to by the tribe, not to seek possession of private homes or small property holdings is dependent upon seeking legislation substituting a satisfactory monetary claim against an appropriate sovereign body, presumably the United States and/or the State of Maine, for the full value of such claims.

Immediate Effects on Maine's Economy

As a result of the pending and expected claims on behalf of the Passamaquoddy and Penobscot Indians, municipal bond offerings have experienced minimal difficulty with certification. Municipalities have been successful in meeting their financial needs thus far by borrowing from banks. Real estate transactions, with one exception, have been pretty much business as usual. It can reasonably be expected that in the future, the lack of ability to clear titles could impede transactions in real estate if the claims proceed in court along the lines recommended. Real estate salesmen and brokers may experience decline in work in businesses which are thinly financed. Attorneys who do title work face the same. The construction industry could decline with the concurrent decline in the financial institutions concerning mortgage markets.

Although this has not proven to be the case to date, it may develop despite the original and continued position of the tribes and their attorneys that they have not, do not now, and will not seek to evict private homeowners in a negotiated settlement or substituted claim. That position, however, would not necessarily open the market in a purely litigation setting. Experiences in Mashpee and Gay Head, Massachusetts, indicate that even where the claim is limited to nonresidential areas, as it was in the Mashpee Tribe's case, the effect of the claim was to cloud titles within the entire claim area with the collateral chilling of the real estate market.

The Broader Implications

The Passamaquoddy and Penobscot claims in Maine are not peculiar to those tribes or to that State. Nearly identical situations are known to exist for the Wampanoags of Gay Head, Massachusetts; Wampanoags of Mashpee, Mass.; Narragansetts of Charlestown, R.I.; Schaghticokes of Kent, Conn.; Western Pequots of Ledyard, Conn.; Oneidas of Oneida, N.Y.; Catawbas of Rock Hill, S.C.; and the Mohawks and the Cayugas of New York.

The Passamaquoddy and Penobscot claims, however, constitute approximately 95 percent of the lands in the United States subject to claims for violation of the Trade and Intercourse Acts. No other claims are, therefore, near the magnitude of the violations claimed in Maine. The claims are very probably limited to the ones presently known in the Eastern States. Federal presence in land transactions was the hallmark of western expansion. It is fair to conclude, therefore, that it is most unlikely that these cases will lead to a host of similar claims outside of the original 13 colony land areas.

The response to similar claims in other States has been markedly different from that of Maine officials. In Rhode Island, for example, where the Narrangansett Tribe has been successfully litigating a claim for the return of 3,000 acres, there have been few, if any, adverse political or economical effects. The Catawba Tribe and the State of South Carolina have carried on very friendly negotiations.

Legislative Proposals

On March 1, 1977, bills were introduced in both the House and the Senate by the Maine congressional delegation to wipe out the claims of these two tribes to return of any lands and limit the claims to monetary damages only. While the introductory remarks to these bills indicate an intent to leave the claims for monetary damages untouched, the proposal to retroactively ratify the alleged land conveyances as of the date of their occurrence might well leave the tribes with no compensible claims whatever.

Any congressional consideration for an interim or ultimate solution for Passamaquoddy-Penobscot/Maine claims could have clear precedential and policy implications for the other similar situations. This is particularly compelling since it would appear that the situation in Maine is one where the State officials have taken the most rigid position against a negotiated settlement. This does not mean, nor should it, that a case-by-case resolution cannot take place by congressional act or ratification of negotiated agreement. It does counsel for careful consideration of any action by Congress.

It is the conclusion of this Commission that the legislative solutions which would completely eliminate aboriginal claims to land and/or claims for damages is morally wrong and in violation of the spirit of the trust obligation of the United States to the Indian people. Compromises must surely be worked out and legislative solutions will ultimately be required, but the proposed legislation should not be enacted.

It is our further conclusion that precipitous action by the Congress at this time might well jeopardize the negotiated process which is just now beginning.

RECOMMENDATIONS

The Commission recommends that:

1. Congress reject any legislative solutions which would completely eliminate claims of tribes based on aboriginal rights in land and claims to damages.

2. The appropriate committees of the House and Senate to which aboriginal and claim abolishment bills have been referred refrain from holding hearings until the White House mediator has had an opportunity for mediation with all parties concerned. The committee be guided by the recommendations of such mediator.

CHAPTER THIRTEEN

GENERAL PROBLEMS

There is throughout all levels of American society substantial lack of knowledge and much misinformation concerning the legal-political status of Indian tribes and the history of the unique relationship between the United States and Indian tribes. This deficiency, particularly when found among all levels of government—Federal, State, and local—has significant negative impact on Indian tribes.

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CHAPTER THIRTEEN

GENERAL PROBLEMS

Cultural Issues

The term "cultural" for American Indians includes every field of endeavor, especially those things which are passed from generation to generation. The study of Indian life by the 11 task forces of the Commission neglected a cultural context, which includes:

Architecture
Folk Art
Folk Crafts
Food
Government
Legal Artifacts
Literature
Medicine
Music
Performing Arts
Recreation
Shelter
Sports
Sculpture

Examination of policies concerning administration and prioritizing Federal responsibility ought to include a review of American Indian cultural matters. The deficiencies of Federal, State, and local policies for Indian cultural support suggest that firm action be taken now, until a long-term plan can be developed for American Indian cultural preservation, including a wide range of innovative cultural activities in Indian communities.

OVERVIEW

In the early 1960's, minority cultural programs flourished with the civil rights movement and merged into the environmental-conservation movements to create an accelerating interest in "preservation" of American ethnic and racial heritage. The Ethnic Heritage Act, the title 7 bilingual education and the programs authorized are manifestations of Federal attention to heritage of ethnic and racial groups. The National Endowment for the Arts and Humanities, the Smithsonian Festival of American Folklife, the Folk Arts Panel within the Arts Endowment, and the American Folklife Center in the Library of Congress attempted to support the traditional arts and expressions of American life. The Department of the Interior and the Bureau of Indian Affairs maintained support of Indian cultures through their arts and crafts programs, and the Park Service and the Department of Agriculture supplemented that support with "crafts-in-the-parks" and extension craft classes. Meanwhile, American antique dealers and lay people alike rediscovered Navajo rugs and silverwork, Sioux beadwork, and Pomo basketry. The demand for Indian craft work far exceeded the initial tourist demands generated by western travel in the 1920's and 1930's. This demand generated an increased effort by Indian people.

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The Indian studies movement was a manifestation of the political and cultural maintenance network that blossomed into institutional and programmatic reality in the early 70's. The Bureau's establishment of the Institute of American Indian Arts was a symbol of interest in Indian cultural studies. No longer did Indian students who were removed from traditional maintenance networks rely on the craft and tradition classes offered at random by Federal institutions under the title of Indian studies programs. An "official" framework now existed for the serious study of Indian tradition. But the unofficial frameworks were still in operation in many parts of the Indian world where grandmothers taught their grandchildren the arts as a way of Indian life; where councils had brought the elders into tribal offices to teach the young the old ways; where urban Indian centers and powwow culture gatherings had inspired the revival of the old arts toward the development of a nontribal "Indian" culture. The old ways are a part of remaining Indian culture and tend to validate American Indian life. The increased demand for Indian cultural grassroots programs was an outgrowth of the social movements in the United States.

American Indians began to develop their own cultural programs but were unable to secure appropriate Federal funds. Unfortunately, the criteria set by agencies' guidelines and program staff were not flexible enough to accommodate Indian desires. Often, non-Indian consultants were attached to a fund request to satisfy the guidelines, and often the original program request was modified to the extent that the new proposal did not match Indian needs. Thus, many programs failed by design. Others did not reach the proposal stage, and many more were never revised. Indian people have been disappointed again and again, and now do not apply for funds. This has resulted in local, marginally funded, and always ephemeral enterprises. Some of the more affluent tribes who were able to negotiate with the non-Indian world around them, acquired the funds to set up tribal cultural centers and museums. Some of these enterprises were attached to a growing Indian owned and operated tourist trade with good facilities. These are the exceptions.

Meanwhile, Federal and State funded programs, through agencies like the arts council, and private foundations continue to support non-Indian scholars and agencies in Indian-related projects. These scholars and agencies have little Indian participation, hence little impact on Indian people. Some projects do impact in a positive way on Indian peoples and are usually those that are started through Indian requests. Many projects do not represent Indian-defined goals and do not serve the best interest of the people. A substantial number are offensive and operate in ways inimical to the interests of Indian peoples.

Academicians—anthropologists, historians, linguists, folklorists, museologist—search for and compete with Indian people for funds. These people are sophisticated in the art of grantsmanship, and many of them participated in developing the guidelines. Indian people do not usually meet the criteria for funding of projects which impinge upon their lives and cultures. For example, the National Endowment for the Humanities has, as a criterion for primary researcher, credentials as an "academic humanist." Few Indian people can meet this formalized criterion, hence few qualify as project director regardless of their heritage and ability to direct and enrich the projects. Indian proposals, developed by tribal peoples without experience in proposal writing for the "humanities" or "arts" are not understood or accepted as "good" or "well-written" proposals by review academicians.

Few trained Indian scholars are used as review panelists by funding agencies; the tendency is to use one or two Indian scholars as "outside" reviewers or non-Indian scholars with a (non-Indian) reputation as experts on Indian material. There are few training Indians or non-Indian people in funding agencies who can assist prospective Indian proposal writers. Indian advice on non-Indian generated proposals is seldom sought. Thus, there are few people who respond to Indian concerns or act in behalf of Indian interests. There seems to be little desire to distinguish between non-Indian interests and Indian consultants or projects. Recently, the head of one division in one of the endowments referred to a group of "Indian educators" which included three non-Indians, and that same endowment issued an information bulletin where Indian and Indian-related projects were presented as support for American Indian projects.

Support for museum-related projects—care of collections, initial establishment of collections—goes to museums with credentialed museologists who purchase and exhibit Indian collections. Tribes who wish to establish museums are unable to establish collections which record their history and culture, because they do not have credentialed people. Exhibits are drawn from collections taken from tribal peoples, then are shown in areas where Indian people cannot and do not go; and when Indian people demand a return of the artifacts taken from their tribes the museums reply that no training persons exist to care for them properly. A national program to train tribal peoples in museology is needed in addition to the minor efforts by a few anthropological museum directors to train curators. Indian scholars who have been invited to review proposals complain that their comments are regarded as inappropriate and discarded.

In addition, support is dwindling for the Ethnic Heritage Acts. Curriculum development funds are unavailable now in any sector of Federal program funding, except through the National Endowment for the Humanities, and the bulk of such funds have gone to well-recognized institutions of higher education in the Northeast. The Smithsonian Institution's Festival of Americal Folklore will not be continued in its extensive form, and there is no longer an Indian assigned to the Indian Awareness Program at Smithsonian. The standing collections of the Museum of Natural History and the unpublished volume of the Handbook of North American Indans reside as the sole activities in American Indian Affairs. Some few sources of funding for cultural activities are available through title 7 (bilingual education) and through the Office of Indian Education in the Office of Education. Some support for cultural activities comes through the Bureau of Indian Affairs. While the National Endowment for the Arts does fund tribal people, the amount is small and comes essentially from the Folk Arts Panel of the Office of Special Programs. The American Folklife Center at the Library of Congress has yet to announce a program direction, and it is difficult to assess the amount of funds to go for

American Indian projects. A bill to support the American Indian junior and community colleges—and their cultural activities—was never reported out of committee. In short, the funds available for Indian cultural support outside of Indian communities themselves is small and declining. It is no accident that the Division of Performing Arts at the Smithsonian dismissed the Indian staff after the Bicentennial Festival of American Folklife and retained staff from the African Diaspora (Afro-American) and Old Ways in a New World (Ethnic/Immigrant American) sections of the festival.

It is ironic that much attention and praise go to Indians for their culture, art, music, dance, and oral traditions, and so little support for preserving the heritage, antiquity, and traditions. The grand museum exhibits and photographic displays of American Indian life which are produced each year from historical rather than living traditions reinforce the belief that Indians are defunct, demoralized people who once had a great tradition. Universities, museums, and Federal programs usually develop around the concept of a romantic past. On the other hand, to develop a living history, it is necessary to involve Indian people rather than to collect artifacts and photographs.

Exhibits and performances about Indian people seldom incorporate living traditions. The powpow dance tradition, for example, is unacceptable to these historians, and only the "purist" form of dance and song suit the musicologists' progessionalism. The entire history of non-Indian developed programs has been to remove artifacts from the care of the people; co-opt song, tale and dance performance and ritual and remove them from the natural places; misinterpret sacred ritual and artifact; and retain the benefits for the persons who did not generate the materials.

Further, Indian traditionalists and progressives have often been in conflict with priorities over land, water, fishing rights; struggles to attain health care, housing, food supplies, and rural services like electricity which took precedence over traditional cultural activities. "It is difficult to think of preserving antiquity when the children are hungry and the roof leaks."

Over many years, scholars and serious researchers have explored Indian literature and related material in their search for useful information that could be used in their own writings and as source materials relating to Indian studies. The works of these people have indicated that a rich record of human literature is to be found in Indian materials. The Federal Government has not seriously considered this to be true, and therefore has allowed generations of Americans to grow up with little knowledge of the availability of such material.

We cannot accept this waste by considering these materials a part of the past, which because it is considered to be dying, is also considered no longer healthy. Experts continue to study and learn from these historic works and are preserving and presenting them to students.

RECOMMENDATIONS

These recommendations look to ways to strengthen those things which represent American Indian heritage, folkways, and antiquity.

They observe the present and propose actions to preserve the past, toward an improved future.

The Commission recommends that:

1. The National Endowments for the Arts and Humanities, the Library of Congress, the American Folklore Center, the Smithsonian Institution, and all Federal agencies which fund Indian cultural activity be directed by Congress to redesign all regulations and guidelines to:

   a. Consider Indian projects along with all other proposals.

   b. Use a revolving membership panel changed every 2 years of Indian and non-Indian scholars to review proposals on Indian-related projects.

   c. Provide grants to Indian-controlled activities which involve Indian tribal peoples, agencies, scholars, and culture carriers as the primary beneficiaries, recipients, and users of the end product.

   d. Mandate that all projects which relate to Indian cultural affairs be accompanied by a "cultural impact" statement delineating the cultural worth to Indian peoples of preserving, enacting, performing, recording and filming the materials or programs, including the impact on traditional expressions, cultural institutions, and economies of the peoples involved.

   e. Reject projects which do not thoughtfully accommodate cultural differences between tribes.

2. The Smithsonian Institution, the National Endowments for the Arts and Humanities and all agencies which fund traineeships in cultural programs (i.e., museum curator programs) train American Indians. Priority in funding be given to those agencies which demonstrate an intent, readiness, and capability for training American Indians to insure long-term benefits.

3. A clearinghouse for the study of American Indian cultures be established (modeled after the Educational Resources for Instruction Clearinghouse) for Indian cultural materials, projects, and programs.

4. A review agency for funding Indian cultural programs be established. It would be designated to act on behalf of tribes, agencies, educators, programs, institutions, and individuals needing assistance in curriculum development, provision for material and human resources related to cultural programing, and proposals for cultural programs, media efforts, or other educational and cultural materials which use Indian artifacts and language. Indian scholars and computer retrieval experts would serve as the base staff for the clearinghouse, which would have the authority to use Federal services allotted to Federal agencies. The clearinghouse would serve as the liaison between Indian institutions and public agencies—pre- and post-collegiate educational institutions, tribal organizations, urban centers training programs, archival and museum resources, and government agencies—to insure maintenance and support of Indian cultural networks and resources.

5. A feasibility study be done on the creation of an Institute of American Indian Culture. An analysis include the possibility of creating a center of knowledge capable of conferring Ph. D. degrees.

NATIONAL AWARENESS CONCERNING INDIAN ISSUES

OVERVIEW

Throughout the first 12 chapters of this report reference has been made to the unique law and policy concerning American Indian tribes and people; the distinct historical experience of Indian tribes; and the pervasive impact that the lack of understanding of both has had.

Chapter One of this report in brief form traces the outline of the historical experience. That chapter attempts to correct the image of American Indians portrayed in the history books used by the educational establishment of this Nation, as well as the imagery created for generations raised on "cowboy and Indian" films and television series. Although recent history has reflected a slightly more balanced presentation of Indians, much remains to be done. For example, in field hearings conducted by the Commission's task forces, current complaints were received concerning the manner in which Indians were represented or ignored in the public school textbooks.

Chapter Two of this report addresses the distinct doctrines and concepts of Indian law. As is specified in the chapter, these doctrines and concepts are "unique" and "special"—"Indian law and policy is a field unto itself." Although the development of Indian law and policy has frequently involved all the branches of the Federal Government, the practicing attorney or government official finds that his education has, with few recent exceptions, totally omitted any training or mention of this "unique" field. Even landmark Supreme Court decisions in Indian law, such as *Worcester* v. *Georgia*, have been traditionally presented to the law student for issues other than Indian law.

The problems created by this lack of knowledge are substantial. Decisions are made at all levels of government involving Indian issues without any awareness that Indian rights are being affected. Testimony received at Commission task force hearings provides concrete evidence of this problem. An attorney representing a State tax department argued the "theory" that Indian tribes were legally akin to the property owners association or the like, a contention specifically and affirmatively rejected by the United States Supreme Court in a case involving the same State. Private citizens frequently evidenced significant misunderstanding of the status of tribal governments and the meaning of reservations. Indian patients complained that many non-Indian health professionals were insensitive to cultural issues in the delivery of medical and related services. Urban Indians have complained of being refused State and local government services they would qualify for under eligibility standards, because the local authorities believed that they had no obligation, Indians being the sole responsibility of the Federal Government. The issue of cultural insensitivity and lack of functional training concerning Indian legal status permeates the section of the report dealing with the placement of Indian children—removal of children from their homes and tribal settings.

RECOMMENDATIONS

The Commission recommends that:

1. Congress, by suitable legislation, require mandatory training in Indian history, legal status, and cultures of all government employees

administering any Federal Indian program or State or local Indian program funded in whole or in part by Federal funds.

2. Congress, by appropriate legislation, appropriate funds to assist school systems in developing educational programs in Indian affairs. Such funds be made available for:

a. An evaluation of the history and government curricula utilized by elementary, secondary, and higher education institutions.

b. The identification of gaps and inaccuracies in such curricula.

c. The provision of model curricula which accurately reflect Indian history, tribal status, and Indian culture. In making this recommendation, it is not the intent of the Commission that such program constitute an "official history." Rather, the intent is merely to encourage scholarly work to fill a recognized void in current educational programs.

ALTERNATIVE ELECTIVE BODIES TO REPRESENT INDIAN INTERESTS

OVERVIEW

Public Law 93-580 mandated the Commission to explore the feasibility of creating some form of alternative elective body for representing Indian interests at the national level of government. The Commission's Task Force on Federal Administration which studied the issue indicated four possibilities:

1. Election of an Indian congressional delegation.
2. Union of Indian Nations.
3. Indian Board of Representatives or Commissioners.
4. Recognition of tribal governments in manner similar to the trust relations between Micronesia and the United States.

The task force also concluded that there was no consensus on any proposal by the various Indian tribes and people and, therefore the task force decided to make no action recommendation. The Commission agrees.

Over and beyond the issues of consensus, there are other important concerns. In determining how the Federal Government can interact with Indians in the development of a single entity, the existing mechanisms must be considered. The primary mechanisms of Indian people is tribal government. From a bureaucrat's view it may be cumbersome to deal with 300-plus tribal entities; but it is essential to do so. There is national Indian consensus on the fundamental issues of jurisdiction and sovereignty, but on specific issues, interests and positions will vary from tribe to tribe. The Federal Government, merely for the sake of administrative convenience, must not avoid its responsibility to deal individually with all tribal governments and Indian organizations on each of these issues.

Multitribal organizations, such as the National Congress of American Indians and the National Tribal Chairman's Association serve various functions, but generally their ability to represent tribal interests is limited to the authority that individual tribes may delegate to them for particular purposes.

There are also organizations, such as the Indian Bar Association, which are counterparts to national bodies such as the American Bar

Association and the National Education Association. These are political arms of tribal governments only when so delegated. Such organizations, however, have from time to time played a significant role in the national political process on issues concerning Indian people.

While the Commission does not endorse any of the proposals indicated by its Task Force on Federal Administration, a brief discussion of each is provided so that interested parties can formulate their own views.

Election of an Indian Congressional Delegation

This approach, which is premised on a combination of all Indian tribes into one political State along with the existing 50 States, would require a constitutional amendment. Two Senators, perhaps three or more Representatives, would be provided. This approach could substantially modify the trust relationship. Two major unanswered questions are raised by this approach: (1) the mechanical feasibility of State structure for geographically dispersed tribes, and (2) the ability of tribes to exclude non-Indians from membership and tribal political processes under statehood status. A variation of this proposal includes statehood status for individual tribes, which has been considered from time to time for the Delawares, the Cherokees of Oklahoma, and the Navajo. Another variation of this proposal would be something akin to the nonvoting delegate status in the House of Representatives that both the Commonwealth of Puerto Rico and the District of Columbia have.

Union of Indian Nations

This approach would establish an Indian legislative body with tribal delegations from each Indian tribe. Election could be by popular vote of each tribe. Each tribal government would reserve the right to ratify actions taken by its delegates or by the Union itself. The Union would serve as the elected Indian voice to work directly with Congress in the development of Indian policy. The proposal envisions that direct access by the individual tribes to Congress would remain, and that the Union would be created by the tribes themselves, with financial support from the United States. Some issues involved in this proposal are: Apportionment of representation among the various tribes constituting such a union: the actual power that such a union would have—legislatively—*vis-à-vis* the tribes; and what status beyond lobbying the union would have in the congressional setting.

Indian Board of Representatives or Commissioners

This approach envisions the direct election by the Indian population and appointment by the President of a board which would define U.S.-Indian policy and coordinate the activities of Federal agencies as they relate to Indian interests. This Board apparently would serve as a major administrative entity in relation to Congress on Indian issues.

Some of the issues in this proposal are: The role of the tribes which are apparently bypassed: the independence of such a body in the Federal structure; and how such a body would, in fact, control other Federal instrumentalities in the area of Indian affairs.

Recognition of Tribal Governments in Manner Similar to the Trust Relations Between Micronesia and the United States

This approach is not a specific proposal but rather an example for study. The Federal Administration Task Force points out that significant debate and thinking concerning the relationship between Micronesia and the United States has been occurring and that this should be studied to determine possible alternatives.

RECOMMENDATIONS

The Commission recommends that:

No congressional action is appropriate at this time.

There is no identified consensus among Indian tribes about any single best specific mechanism for a national elective Indian body.

Any substantive proposal requiring congressional action come from the Indian tribes.

CONSOLIDATION, REVISION, AND CODIFICATION OF FEDERAL INDIAN LAW

OVERVIEW

Since 1873, there have been only two efforts at codification of Federal-Indian law: one in 1917, which provided minimal guidance in the compilation of title 25 of the United States Code in 1926; and one in 1930, which provided minimal cleanup when the Indian Reorganization Act of 1934 was enacted. These efforts are discussed and documented by the Commission's Task Force on Consolidation, Revision, and Codification of Federal-Indian law. We believe the work of this task force constitutes a very significant first step toward full revision and codification of title 25.

The task force's report contains numerous recommendations, most of which are grounded in existing law or recently declared congressional policy. The great bulk of the recommendations relates to repeal of obsolete laws, consolidation of redundant provisions into single provisions to streamline the Code, or amendment of existing provisions to make them conform to more recently enacted legislation.

The major proposed revisions of existing law relate to:

1. Adoption of a comprehensive congressional funding and declaration of policy.
2. Adoption of statutorily enacted rules of construction to govern interpretation of Federal law.
3. Revision of the laws relating to Federal administration to conform to the 1950 Reorganization Plan No. 3 adopted by Congress and the Executive in that year; and implementation and enforcement of the employment and contracting preference laws in the 1934 Indian Reorganization Act and the 1975 Self-Determination and Education Assistance Act.
4. Revision of the laws relating to land use, acquisition, and protection so as to give substance to the declared congressional purpose of protecting the Indian land base.
5. Revision of the laws relating to the deposit and investment of Indian moneys to eliminate the presently confusing array of

provisions and to compel Executive compliance with the purpose declared by Congress in 1938 when the last of these laws was enacted.

6. Amendment of the Federal Internal Revenue Code to compel the Internal Revenue Service to conform to 200 years of judicial decisions and congressional enactments recognizing Indian tribes as governmental bodies within the American body politic, and compelling them also to shape the Federal tax laws toward individual Indians in a manner consistent with the Federal trust responsibility.

7. Repeal of Federal law authorizing State taxation of Indian mineral resources and adoption of a Federal policy toward State taxation with reservation boundaries which fosters the economic independence of Indian tribes.

8. Adoption of statutory provisions to authorize award of attorney fees to Indian litigants in cases in which the Federal Government has either failed to exercise its responsibility to represent Indian interests or tribes have been compelled to hire independent counsel due to potential conflicts of interest with the United States, and the Indian litigant is successful in his claims.

9. Amendment of the 1968 Civil Rights Act to clarify its scope and application to Indian tribes and give maximum recognition to the sovereign rights of the Indian people to self-government within Indian country while at the same time retaining the basic protections afforded by that Act.

10. Complete overhaul of the BIA Manual with publication and distribution of this and other legal materials covered by the 1968 Civil Rights Act to Indian tribes and organizations.

Title 25 presently contains numerous statutory provisions which are either superseded by subsequent legislation, obsolete by virtue of the passage of time, redundant to prior legislation, or in total conflict with present policies relating to the administration of Indian affairs.

RECOMMENDATIONS

The Commission recommends that:

Congress refer the entire report of the Commission Task Force on Consolidation, Revision and Codification of Federal Indian Law to the appropriate committee or committees to bring the work to completion:

1. Optimally, referral to appropriate committees of the House and Senate or to select committees in each House with sufficient time and funds to complete the task.
2. The committee(s)' work be conducted through a process of consultation with Indian people.

Creation of Native American Studies Division in the Library of Congress

OVERVIEW

When this Commission began its research pursuant to the mandate of Public Law 93-580 to conduct "a comprehensive investigation and study of Indian affairs," we made several discoveries: There have been a great number of studies conducted in the past in Indian affairs;

considerable sums of money have been made available by public and private sources for such research; the interest in research in Indian affairs not only continues unabated but increases; and the demand by Congress continues for some studies, reliable statistics, Indian program reviews, and other research relating to Indian issues. Indeed, the creation of this Commission is an indication of this need for research in Indian matters. But despite this growing and healthy interest, we found that much of the basic information sources not easily available to the researcher. Also missing was a means for quickly identifying and reviewing the current materials being produced almost weekly throughout the country. This is true despite the capable efforts of the Library of Congress and other institutions to respond to the need.

For example, we found that the Library of Congress has some 18,000 titles listed in its card catalog relating to Indians. This does not include the hundreds of articles in law journals and other periodicals, many scholarly analyses, statistical surveys, and hundreds of government and private reports covering the breadth of Indian matters. Nor does it include bulletins, newsletters, special contract studies, and short-term research materials produced by universities across the continent. Nor does it include the important and unique collections of primary source materials in Indian history and legal issues maintained by institutions such as the Newberry Library in Chicago, Ill., and the National Indian Law Library in Boulder, Colo. Nowhere is there a central depository where we could identify all those information sources crucial to a thorough research project in Indian affairs.

Such a condition unavoidably leads to unnecessary duplication and waste of limited research funds. It also means that Congress can never be certain if it has available the most recent and most definitive information which may bear upon possible legislation or program oversight activities in Indian affairs.

This shortcoming is much more serious in Indian research than it would be in other subjects. This is due partially to the overwhelming volume of information which exists and also to the fact that the relationship between the United States Government and Indians spans more than 2 centuries. Many of the legal rights and policy rationales are founded deep in history. Only by appreciating that historical progression can perspective and wise decisionmaking prevail in Federal-Indian relations.

To correct these deficiencies and provide Congress and the public with a modern-day depository for relevant and definitive research sources in Indian affairs, the Commission recommends the following four steps. Recognizing that preparation of a definitive bibliography would be too costly and time consuming to be readily available to fill the great and current need, the Commission recommends a more limited three-stage project.

RECOMMENDATIONS

The Commission recommends that:

Congress authorize the Library of Congress and, if necessary, appropriate funds to:

a. Create a Native American Studies Division in the Library with a central reference area and a research support staff of

Native American specialists. The contents of such a collection to be determined by the Library staff, but to consist of at least the basic reference works most frequently used in Indian affairs research by both scholars and those active in public affairs.

b. Compile for publication a collection of Native American studies resources consisting of: a bibliography of basic reference tools for research in all aspects of Indian affairs, indexed by subject matter; a bibliography of bibliographies relating to Indian affairs; and a directory of research sources for Native American studies, including but not limited to specialized collections such as those in the Department of the Interior Library, the National Indian Law Library in Boulder, Colo., and the Newberry Library in Chicago, Ill. Such a research guide to contain materials located in the Library of Congress or other depository libraries accessible to the public and be made available for sale to the public and updated periodically.

c. The Selected Dissemination of Information System (S.D.I.) maintained by the Congressional Research Service of the Library of Congress expand its coverage of publications containing Native American articles and made available for sale to the public.

d. In response to these recommendations, the Librarian of Congress be directed to report to the Congress the estimated cost of these changes and projects and the estimated time for their completion. In addition, the Librarian be directed to make a feasibility study to determine the requirements for undertaking a definitive retrospective bibliography of all Native American research materials, indexed by subject matter.

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SEPARATE DISSENTING VIEWS OF CONGRESSMAN LLOYD MEEDS, D-WASH., VICE CHAIRMAN OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

INTRODUCTION

With the creation of this Commission it was hoped that Congress would have before it an objective statement of past and current American Indian law and policy so that it could exercise its powers wisely in legislating a coherent and lasting policy toward American Indians.

Unfortunately, the majority report of this Commission is the product of one-sided advocacy in favor of American Indian tribes. The interests of the United States, the States, and non-Indian citizens, if considered at all, were largely ignored. This was perhaps inevitable because the enabling legislation which created the American Indian Policy Review Commission, Public Law 93-580, 88 Stat. 1910, required that 5 of the 11 Commissioners be American Indians, and that each of the investigating task forces be composed of 3 persons, a majority of whom were required to be of Indian descent. Public Law 93-580, § 4(a). As a result, of the 33 persons appointed to lead the task forces, 31 were Indian.

With due regard to those who worked on the task forces, the reports were often based on what the members wished the law to be. Their findings and conclusions were often poorly documented. Recommendations ignored contemporary reality. As an example, the report of Task Force No. 1 would require the return to Indian possession and jurisdiction large parts of California, Oregon, Nebraska, North Dakota, South Dakota, and Oklahoma. Despite contemporary litigation, most Americans are justified in believing that 400 years have been sufficient to quiet title to the continent.

In addition, the Commission's staff interpreted the enabling legislation as a charter to produce a document in favor of tribal positions. In support of its one-sided advocacy, the Commission's staff relied on language in the enabling legislation ordering a review of Federal Indian law and policy "in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefits of Indians." Declaration of Purpose, Public Law 93-580, 88 Stat. 1910. But, clearly, the formulation of policies and programs for the benefit of Indians did not require this Commission to prepare a document encompassing a tribal view of the future of American Indian law and policy. For Congress to realistically find this report of any utility, the report should have been an objective consideration of existing Indian law and policy, a consideration of the views of the United States, the States, non-Indian citizens, the tribes, and Indian citizens. This the Commission did not do. Instead, the Commission saw its role as an opportunity to represent to the Congress the position of some American Indian tribes and their non-Indian advocates.

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This Commission failed to consider the fundamental and controversial issues in contemporary Indian law. Instead, it assumed as first principles, the resolution of all contemporary legal and policy issues in favor of Indian tribes. Hence, the report is advocacy and cannot be relied upon as a statement of existing law nor as a statement of what future policy should be. The report's utility, then, is limited to informing the Congress of the special interests of some American Indian tribes and their non-Indian advocates. Congress will either have to authorize another Commission to ascertain the views of non-Indians, the States, and the United States or perform that function on its own.

One further introductory comment is in order. Many of the chapters in the Commission report were hastily prepared and hastily presented to the Commission for review and approval. Even as I write this, various chapters of the report are unavailable to me and various of the other chapters are in the process of rewriting. Neither I, nor my colleagues on the Commission, have had an opportunity to carefully evaluate the staff input or, for that matter, to even read much of the report prior to its promulgation as a Commission report. We experienced the same problem when attempting to review and evaluate the changed report after it was circulated and rewritten. Because of the Commission's schedule, I have neither the time nor the resources to adequately evaluate, critique, and recreate this report. Yet certain fundamental and recurring ideas have been adopted by this report and labeled legal doctrine, but which are, in reality, either contrary to law or are tribally oriented resolutions of disputed legal issues. Hence, I must make some comments on them at this stage in the process so that the unwarranted findings and conclusions in this report do not go unchallenged. These include the notion of tribal self-government (referred to as "sovereignty" by tribal advocates), jurisdiction (including State power over Indian country and tribal power over non-Indians, or the lack thereof), the legal obligations of the United States (referred to vaguely as a "trust responsibility"), various social welfare programs which would in effect be an exercise of the Congress' spending power under the Constitution (but which in this report go under the guise of legal obligations), sovereign immunity, the absence of statutes of limitations or other legal impediments to the assertion of stale claims, the exercise by tribes of regulatory power over their members beyond the territorial limits of their reservations, and definitional problems associated with the words "Indian" and "tribe".

When in January 1977 it became clear that I would have serious and substantial disagreement with the Commission's findings and recommendations, I retained, through the Commission, Frederick J. Martone of the Arizona bar to work with me in critically evaluating the Commission's report. Mr. Martone and his colleague, Mr. Neil V. Wake, assisted me greatly in the preparation of these minority views.

Sovereignty—Tribal Self-Government or Territorial Government?

The fundamental error of this report is that it perceives the American Indian tribe as a body politic in the nature of a sovereign as that word is used to describe the United States and the States, rather than as a body politic which the United States, through its sovereign power, permits to govern itself and order its *internal* affairs, but not the affairs of others. The report seeks to convert a political notion into a legal doctrine. In order to demythologize the notion of American Indian tribal sovereignty, it is essential to briefly describe American federalism.

In our Federal system, as ordained and established by the United States Constitution, there are but two sovereign entities: the United States and the States. This is obvious not only from an examination of the Constitution, its structure, and its amendments, but also from the express language of the 10th amendment which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

And, under the 14th amendment, all citizens of the United States who are residents of a particular State are also citizens of that State.

The Commission report (especially chapters 3 and 5), would have us believe that there is a third source of sovereign and governmental power in the United States. It argues that American Indian tribes have the characteristics of sovereignty over the lands they occupy analogous to the kind of sovereignty possessed by the United States and the States. The report describes Indian tribes as governmental units in the territorial sense. This fundamental error infects the balance of the report in a way which is contrary to American federalism and unacceptable to the United States, the States, and non-Indian citizens.

The blunt fact of the matter is that American Indian tribes are not a third set of governments in the American federal system. They are not sovereigns. The Congress of the United States has permitted them to be self-governing entities but not entities which would govern others. American Indian tribal self-government has meant that the Congress permits Indian tribes to make their own laws and be ruled by them. The erroneous view adopted by the Commission's report is that American Indian tribal self-government is territorial in nature. On the contrary, American Indian tribal self-government is purposive. The Congress has permitted Indian tribes to govern themselves for the purpose of maintaining tribal integrity and identity. But this does not mean that the Congress has permitted them to exercise general governmental powers over the lands they occupy. This is the crucial distinction which the Commission report fails to make. The Commission has failed to deal with the ultimate legal issue, which is the very subject of its charter.

In addition, the Commission has failed to make the distinction between the power of American Indian tribes to govern themselves on the lands they occupy, and their proprietary interest in those lands. Mere ownership of lands in these United States does not give rise to governmental powers. Governmental powers have as their source the

State and Federal constitutions. Hence, as landowners, American Indian tribes have the same power over their lands as do other private landowners. This would include the power to exclude or to sue for trespass damages. But landowners do not have governmental powers over the land they own. Land ownership, alone, is insufficient to give rise to governmental powers. Having failed to make this distinction, the Commission seeks to bootstrap its "tribe as a government" theory by relying on ownership principles.

Indian reservations exist within the boundaries of the States and within the United States. Reservation Indians are citizens of the States in which they live and of the United States. They are subject to the laws of the United States and, but for the exercise of congressional power, reservation Indians are subject to the governmental power of the States in which they live. American Indian tribal self-government comes into play because the Congress, in exercising its powers under article I, § 8(3), of the United States Constitution, has, in general, insulated reservation Indians from State governmental power. In order to promote the preservation of their distinctive cultures and values, the Congress has decided that some American Indians should be allowed to make their own laws and be ruled by them. This does not mean that the Congress allows American Indian tribes to govern their reservations in the same way in which a State governs within its boundaries. A tribe's power is limited to governing the internal affairs of its members. The United States Supreme Court has over and again upheld the power of the State to impose its law on non-Indians within the reservation. If American Indian tribes had the kind of sovereignty which this Commission urges, and if Indian tribal self-government were territorial rather than purposive, the States could not have jurisdiction over non-Indians within the reservation. These principles are easily demonstrated.

The doctrine of inherent tribal sovereignty, adopted by the majority report, ignores the historical reality that American Indian tribes lost their sovereignity through discovery, conquest, cession, treaties, statutes, and history. An international tribunal, Cayuga Indian Claims (*Great Britain* v. *United States*), 20 Am. J. Int'l L. 574, 577 (1926) (American and British Claims Arbitration Tribunal) and the United States Supreme Court, *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) and *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), have applied these well-settled international law doctrines to extinquish American Indian tribal sovereignty. Hence, to the extent American Indian tribes are permitted to exist as political units at all, it is by virtue of the laws of the United States and not any inherent right to government, either of themselves or of others.

Turning then to the laws of the United States, the supreme law is, of course, the United States Constitution. It is obvious from a reading of the Constitution that there are but two sovereigns, the United States and the States. And to the extent that American Indian tribes may claim a position in the interstices of the Constitution on which to ground a constitutional guarantee of separate tribal existence, the 10th amendment rather plainly destroys the argument. Since the draftsmen separately delineated foreign nations from Indian tribes in article I, § 8(3), Indian tribes were, even at that early date, not considered foreign nations. See *Cherokee Nation* v. *Georgia*, *supra*, 30 U.S. (5 Pet.) 1, 18 (1831). It is clear that nothing in the United States Constitution guarantees to Indian tribes sovereignty or prerogatives of any sort, let alone their continued existence. The majority argue that since American Indian tribes did not participate in the creation of the United States Constitution, they are not bound by it. The folly of the majority's argument is apparent. The majority ignore the fact that American Indian tribes were conquered and subordinated to the will of the people of the United States. The consent, or lack thereof, of the ancestors of contemporary American Indians to the Government of the United States is quite irrelevant to the applicability of the sovereignty of the United States to American Indians and their tribes. Nor may anyone exempt himself from the sovereignty of all the people. Our predecessors fought a war among themselves over this and the question is settled. It is too late in the day to seek to recreate 400 years of history.

Congress, of course, has not been silent. During the conquest portion of our history with Indian tribes, we dealt with Indian tribes by treaty, under article II, § 2(2), of the Constitution. The treaties generally permitted Indian tribes to govern their own members but not others. See e.g., Treaty with the Cherokees, December 29, 1835, 7 Stat. 478, 481. When conquest was nearly complete, the Congress declared that no Indian nation or tribe would be acknowledged or recognized as an independent nation or tribe with whom the United States could contract by treaty. Act of March 3, 1871, ch. 120, 16 Stat. 544, 25 U.S.C. § 71.

Tribal government, no doubt, had one purpose when Indians were neither citizens of the United States nor of the State in which they lived. See, *Elk* v. *Wilkins*, 112 U.S. 94, 5 S. Ct. 41 (1884). But all noncitizen Indians were made citizens of the United States by the Act of June 2, 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 1401(a)(2). And, under the 14th amendment to the United States Constitution, citizens of the United States are citizens of the State wherein they reside. American Indians, therefore, are citizens of the State in which they reside and the United States. They cannot now claim that their tribal entity gives to them a source of governmental power in an extra-constitutional sense.

Law follows reality and experience. Accordingly, the Supreme Court's treatment of the role of the tribe in the Federal system has reflected the realities of the tribe at the time the Court has dealt with the problem. But from the very beginning, the Court made it clear that Indian tribes were not sovereigns. In *Johnson* v. *M'Intosh*, *supra*, 21 U.S. (8 Wheat.) 543 (1823), the Court examined the legal impact of European settlement and concluded that discovery gave title to the continent to the European nation which made the discovery. 21 U.S. (8 Wheat.) at 573. The Court instructed us that the United States held title to the continent and had the exclusive right to extinguish the Indian title of occupancy either by purchase or by conquest, and that title acquired and maintained by force was not a proper subject of judicial inquiry. 21 U.S. (8 Wheat.) at 587, 589.

In *Cherokee Nation* v. *Georgia*, *supra*, 30 U.S. (5 Pet.) 1 (1831), the Court instructed us that lands occupied by Indians were part of the United States and that tribes were not foreign nations under the Constitution. Id. at 18, 20. The Court described Indian tribes as "domestic dependent nations." Id. at 17. This was no doubt true in 1831. As the Court made clear, tribal Indians were "aliens, not owing allegiance to the United States". Id. at 16. And, compare the separate concurring opinions of Mr. Justice Johnson and Mr. Justice Baldwin with the dissenting opinion of Mr. Justice Thompson. The former denied tribal sovereignty while the latter affirmed it. I make these references to show that the issue of tribal sovereignty is one of long standing controversy. The majority would have us believe that the notion of tribal sovereignty is not an issue at all but a well settled legal doctrine.

By 1886, conditions had changed such that the Supreme Court would say:

> Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States or of the States of the Union. *There exist within the broad domain of sovereignty but these two. United States* v. *Kagama,* 118 U.S. 375, 379 (1886). [Emphasis added.]

The Court upheld a Federal statute providing for Federal criminal jurisdiction for the murder of an Indian by an Indian on a reservation. Suffering under the narrow view of the commerce power of the time, the Court did not rely upon the Indian commerce clause, article I, § 8(3), but held the statute was constitutional "because it [jurisdiction over a reservation] never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." 118 U.S. at 384–85. The Court's premise was that sovereignty exists only in the United States and the States. Since the State had no jurisdiction, the United States had to have it.

Another case of the same era is even more specific. In *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 10 S. Ct. 965 (1890), the Supreme Court held that Congress had the power to take by eminent domain tribal land. The tribe had argued that the lands through which a railroad was authorized by Congress to construct its railway were held by the tribe as a sovereign nation and that the right of eminent domain within its territory could be exercised only by it and not by the United States without tribal consent. The Supreme Court rejected this argument summarily. 10 S. Ct. at 970. The Court said:

> The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, *or in the sense that the several states are sovereign*, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of congress defining the relations of that people with the United States. 10 S. Ct. at 969. [Emphasis added.]

Therefore, not only were Indian tribes not nations as was the United States, but they were not sovereigns even in the domestic sense as were the several States of the Union. The Court went on to say:

> It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several states, and could not exercise the same power in a territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and *directly* subject to its political control. 10 S. Ct. at 971. [Emphasis added.]

The Court was making an important point. While the States of the Union are not political subdivisions of the United States but rather sovereign in their own sphere under the Federal Constitution, Indian tribes are political subdivisions of the United States and are under the direct political control of the United States. Since the United States could exercise the power of eminent domain in the several States, a fortiori it could exercise the same power over territory occupied by an Indian tribe.

If the Supreme Court instructed us in 1886 that "[t]here exist within the broad domain of sovereignty but these two [the United States and the States]", how can the majority of this Commission conclude that Indian tribal sovereignty exists in the territorial sense rather than in the more limited sense of congressionally licensed self-government over its own members and its internal affairs? Objectivity should have required this Commission to state that the issue of tribal sovereignty, though long settled against Indian claims, should be reopened by the Congress and report the various arguments on both sides, making whatever recommendations it deemed appropriate. The Congress could then either accept or reject recommendations as a matter of policy. The Commission, in essense, is making political recommendations under the guise of legal doctrine. This Commission uses the word "sovereignty" as it is politically used by Indian tribes "without regard to the fact that as applied to Indian tribes 'sovereign' means no more than 'within the will of Congress' ". *United States* v. *Blackfeet Tribe*, 364 F. Supp. 192, 195 (D. Mont. 1973). Indeed, by 1901, the Supreme Court would tell us that "[t]he North American Indians do not and never have constituted 'nations' * * *" *Montoya* v. *United States*, 180 U.S. 261, 21 S. Ct. 358 (1901).

Advocates of inherent tribal sovereignty frequently rely on the case of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), in which the Supreme Court struck down a Georgia statute in direct conflict with Federal treaties and statutes. But a reading of the case will show that the Georgia statute which purported to regulate the conduct of those in Indian country was held invalid not because of tribal sovereignty, but because under the Constitution, the matter of Indian affairs was exclusively within the Federal power. The Congress had exercised that power by both treaties and statutes which were in conflict with the Georgia statute. The Court did say that the laws of Georgia could have no force within the Cherokee Nation. 31 U.S. (6 Pet.) at 561. But the Court proceeded on "the actual state of things", Id. at 543, and the reality of 1832 has given way to a different reality in our contemporary era. For by 1973, the Supreme Court rejected the conceptual clarity of Marshall's view in *Worcester* v. *Georgia* and rejected the broad assertion that the Federal Government has exclusive jurisdiction over the tribe for all purposes and that the State is, therefore, prohibited from enforcing its laws against any tribal enterprise whether the enterprise is located on or off tribal land. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 147–48 (1973).

And in *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), the Court held that reservation Indians are insulated from State law, not because of tribal sovereignty, but, if at all, because of applicable Federal treaties and statutes. 411 U.S. at 172. Indeed, the Court said:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption * * *. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. 411 U.S. at 172.

The Court said that Federal preemption of the field was such that the issue of residual Indian sovereignty was moot. 411 U.S. at 172 n. 8. Hence, it is clear that reservation Indians are immune from State law, absent a Federal statute to the contrary, not because of tribal sovereignty, but because of Federal preemption. *Bryan* v. *Itasca County*, — U.S. —, 96 S.Ct. 2102, 2105 n. 2. (1976).

If Indian tribes had inherent sovereignty, they would be free from State law even in their dealings with non-Indians. But such is not the case. State law applies to non-Indians on a reservation and the States may even require a tribe to implement State law as to non-Indians. *Moe* v. *The Confederated Salish and Kootenai Tribes of the Flathead Reservation*, — U.S. —, 96 S.Ct. 1634, 1645–46 (1976). The Supreme Court upheld this State power because it did not frustrate tribal self-government. 96 S. Ct. at 1646. It is clear that if the tribe was a government in the territorial sense rather than a limited purposive sense, the Court would be wrong since the application of State law to non-Indians would interfere with a tribe's territorial government. If, on the other hand, tribal self-government is merely purposive, in contrast to general and territorial, then the application of State law to non-Indians is proper because it does not frustrate the limited purpose of allowing Indians to govern themselves. It is plain to me that Congress and the Supreme Court see tribal government in the purposive sense, not the territorial sense.

Another major case relied on by the Commission to support its theory is *United States* v. *Mazurie*, 419 U.S. 544 (1975). But it is clear that this case does not support inherent tribal sovereignty. On the contrary, the case merely held that (1) Congress has the power to regulate the sale of alcoholic beverages in Indian country under article I, § 8 of the Constitution, and that (2) Indian tribes are entities with some independent authority over matters that affect the internal and social relations of tribal life such that Congress could constitutionally delegate its own authority to the tribe. The Court specifically said "[w]e need not decide whether this independent authority [the tribe's] is itself sufficient for the tribes to impose Ordinance No. 26 [requiring retail liquor outlets within Indian country, including those on non-Indian land, to obtain a tribal license]." Despite this language, the Commission report says of *Mazurie* "it appeared that the tribe could exercise such regulatory power without benefit of Federal law on the basis of its own inherent sovereignty." [Commission report, ch. 5, part B at 156.] So much for objectivity. Unless words are infinitely elastic, the Court's opinion in *Mazurie* simply cannot be pressed into the meaning the majority report attributes to it. Similar misstatements of law abound in the report.

The Commission report neglects to mention that there is not a single case of the United States Supreme Court which has ever held that tribes possess inherent tribal sovereignty such that in the absence of congressional delegation they could assert governmental power (1) over nonmembers of the tribe, and (2) exclude State jurisdiction. The exclusion of State jurisdiction over reservation Indians has from *Worcester* to this day been based on Federal preemption. And, tribal jurisdiction over non-Indians, as in *Mazurie*, supra, and *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), has been based on specific congressional delegation, not on general notions of tribal power.

In sum, the Commission has converted the doctrine of tribal self-government into a doctrine of general tribal government by taking a quantum leap forward without any adequate legal foundation. And, I might add, prescinding now from the legal issues involved, the Commission has not even explained why, for policy reasons, it would be a good thing for Indian tribes to exercise general governmental powers over the lands they occupy. The Commission has just assumed that because Indian tribes would like to exercise governmental powers over their territory, it would be wise to let them. There is no adequate discussion in the Commission report of the detriments of such a course of action, much less any weighing of the advantages and disadvantages. The report fails to take into consideration that Indian tribes are no longer isolated communities. Indian reservations now abut major metropolitan areas in this country. The Commission report makes much of the fact that reservation Indians want to be left alone and be free of State interference (even though they are citizens of the State, vote in State elections, and help create State laws which are inapplicable to them), yet fails to understand that by arguing for the exercise by Indian tribes of general governmental powers, Indian tribes cannot be left alone. For example, the Commission's recommendations would leave us with the following results. Reservation Indians would be citizens of the State but be wholly free of State law and State taxation even though they participate in the creation of State law and State taxing schemes. In short, reservation Indians would have all the benefits of citizenship and none of its burdens. On the other hand, non-Indian citizens of the State would have no say in the creation of Indian law and policy on the reservation, even if they were residents of the reservation, and yet be subject to tribal jurisdiction. In short, non-Indians would have all the burdens of citizenship but none of the benefits. This is a strange scheme to behold.

The analytical framework adopted by the Commission is, in a sense, upside down. By adopting the doctrine of inherent Indian tribal sovereignty, the Commission looks at the original powers of the tribe and concludes that the tribes have retained all those powers except where expressly limited by the Congress. I submit the Commission's point of departure is faulty. The focus is not on the nature of the prior rights of tribal government. The question is by what mandate do tribal governments govern today? Under our Federal Constitution, there are but two sources of power: the States and the United States. Political subdivisions of the States derive their power from the States. Territorial governments derive their power from the United States. *United States* v. *Kagama*, 118 U.S. 375 (1886). Hence, all political entities exercising powers of government within the political boundaries of the United States are exercising powers derived either from the United States or the States. To the extent that the Commission does not agree with this position, it is clear that the Commission would assert that Indian tribes exercise powers of self-government in some extra-constitutional sense.

In the 19th Century, when *Talton* v. *Mayes*, 163 U.S. 376 (1896) (holding that the Bill of Rights was not applicable to Indian tribes) was decided, tribal Indians were neither citizens of the United States nor of the States in which they lived. See *Elk* v. *Wilkins*, 112 U.S. 94 (1884). Ever since 1924, however, tribal Indians have been citizens of the United States, 8 U.S.C. § 1401(a)(2), and, under the 14th amendment, they are citizens of the States wherein they reside. The Commission report ignores the events of the last 100 years. In the 19th century Congress could not always control the activities of tribal Indians. Today Congress can. The theory adopted by the Commission would permit Congress to allow tribal governments to do what Congress itself cannot do because of Federal constitutional limitations.

The Constitution, as originally enacted, excluded Indians not taxed in determining the number of Representatives in the House of Representatives to which a State was entitled. U.S. Const. Art. I, § 2. The 14th amendment, ratified in 1868, continued this exclusion. When Indians were not citizens, a State could prohibit an Indian from voting in State elections, *Elk* v. *Wilkins*, 112 U.S. 94 (1884), despite the provisions of the 15th amendment. In short, tribal Indians were not considered part of the constitutional framework. Tribal Indians, however, were brought into the constitutional framework by 1924. 8 U.S.C. § 1401(a)(2). The Commission does not deal with the effect of this.

My point is this. To the extent tribal Indians exercise powers of self-government in these United States, they do so because Congress permits it. Tribes exercise powers of self-government as Federal licensees, because and as long as Congress thinks it wise. More than a tribe's *external* attributes of sovereignty have been extinguished. The Commission draws a distinction between the extinguishment of external attributes of sovereignty, which it concedes the United States has done, and internal attributes of sovereignty, which it alleges the United States has never done. It is my position that the one goes with the other. American Indian tribal governments have only those powers granted them by the Congress.

Those powers have over and again been labeled self-government and not sovereignty. It is one thing for the Congress to permit tribal Indians to govern themselves and not be subject to Federal constitutional limitations and general Federal supervision. It is quite another thing for Congress to permit Indian tribes to function as general governmental entities not subject to Federal constitutional limitations or general Federal supervision. The position adopted by the Commission would have Indian tribes exercising powers which the United States itself cannot exercise because of constitutional limitations.

Finally, there is no adequate theoretical basis for the assertion of inherent tribal sovereignty. The assertion of inherent tribal sovereignty proves too much. It would mean that whenever there is a group of American Indians living together on land which was allocated to them by the Federal Government, they would have the power to exercise general governmental powers. The source of those powers would then be some magical combination of their Indianness and their ownership of land. Governmental powers do not have as their source such magic. Governmental powers in these United States have as their source the State and Federal constitutions. It is clear that Indian tribes do not govern themselves under State power. It is equally clear, however, that they govern themselves under the Federal power, and like all Federal power, their powers are specifically limited and the limitation with respect to tribes is one of self-government rather than the government of others. It is one thing for the Congress to permit tribal Indians to make their own laws and be ruled by them without State interference. It is quite another for the Congress to permit tribes to exercise general governmental powers without general Federal supervision. War, conquest, treaties, statutes, cases, and history have extinguished the tribe as a general governmental entity. All that remains is a policy. And, that policy is that American Indian tribes may govern their own internal relations by the grace of Congress. General governmental powers exist in this country only in the United States and the States.

Having missed this point, the Commission has missed the opportunity to address some of the major issues arising out of American Indian law and policy. What does it mean to be a citizen of a State and yet be immune to its laws? What is the basis for asserting that reservation Indians shall have representation in State government, but without taxation? On the other hand, what is the basis for asserting that non-Indian residents of Indian country shall not be represented in tribal government, yet be subject to tribal law, courts, and taxation? Is this obvious dual standard bothersome? And, if not, why not? What does it mean for a reservation to be within the boundaries of a State?

In his *The Role of the Supreme Court in American Government* (1976), Archibald Cox had occasion to describe the Federal system. He described the dual nature of State and Federal sovereignty and said:

> The result is that within any territorial unit (any State) there are always two governments—State and Federal—operating side by side but each sovereign and independent within its functional sphere. Each of us (unless an alien) has dual citizenship; he is a citizen of the United States and of the State in which he resides. Each pays two sets of taxes. Each may claim rights under two governments. Each is subject to two sets of laws, one State and one Federal. Violations of a State law are subject to prosecution in the State court, violations of a Federal law in a Federal court. Civil cases may be brought in either the State or Federal judicial system according to the nature of the cause of action. Cox, supra, at 22.

How does one fit the Indian tribe and the reservation Indian into this scheme? Is Cox guilty of oversimplification? Historical inaccuracy? These questions, which have gone unasked, and, therefore, unanswered by the Commission, must be raised and answered before the Congress can begin to deal with changes in American Indian law and policy.

Prior to reservation Indian citizenship, Federal insulation of them from State law created no urgent problem. But once reservation Indians became citizens of the United States, they became citizens of the States wherein they resided and were then eligible to vote in State and local elections, run for State and local public office, and enjoy State services, such as public education. Hence, they help create and administer law which is not applicable to them. They enjoy State services without sharing in the burden of financial support. This creates enormous hostility among non-Indians who feel (1) with the rights of citizenship go its burdens, and (2) if Congress is to insulate Indians from State taxation, it is the burden of Congress to provide the Indians' fair share of support to State services.

A particularly pernicious consequence of the existing scheme is that in those political subdivisions of a State in which reservation Indians are a majority, they can control that level of government and, for example, set property tax rates which are applicable only to non-Indians. This has in fact occurred and is no mere potentiality. The Commission appears to be content to accept representation without taxation and taxation without representation. Our forefathers were not.

WHO DID THE RESERVING?

In support of its argument that Indian tribes by treaty have retained to themselves inherent powers of self-government, the Commission relies upon *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662 (1905). It is true that there is dictum in that case to the effect that the treaty in that case "was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." 25 S. Ct. at 664. This dictum raises the question of whether, in instances where the United States required Indians to relocate themselves and put them on reservations, the United States reserved the land for Indians or whether the Indians reserved the land for themselves. But this question must yield to a conceptual distinction. It is one thing to say, as the Court said in *Winans*, that Indian treaty rights belonging to Indians whose aboriginal possession was not disturbed by the treaty but rather confirmed, are rights reserved by the tribe. It is quite another thing to say that any tribe anywhere has reserved to itself the land on its reservation and various rights to self-government. The leap is unwarranted. The treaties vary. The reservations vary. Many Indians now exist on reservations which have no relationship to ancestral or aboriginal homes. Hence, it is clear that in these instances the United States reserved the land for Indians.

I believe the United States Supreme Court has recognized this conceptual distinction. In *Colorado River Water Conservation District* v. *United States*, —— U.S. —— 96 S. Ct. 1236 (1976), frequently referred to as the *Akin* case, the Court held that the McCarran amendment, 43 U.S.C. § 666, by which the United States consented to suit in State court for the adjudication of Federal water rights, extended to Indian reserved water rights. The Court described Indian reserved water rights under the *Winters* doctrine as included in those rights where the United States was "otherwise" the owner under the McCarran amendment. 96 S. Ct. at 1242. To do this, the Court viewed the Government's trusteeship of Indian rights as ownership and said that for the purposes of the McCarran amendment there was no distinction between Indian rights and non-Indian rights. Id. Accordingly, since the McCarran amendment provided the consent necessary to sue the United States, and since Indian water rights were among Federal water rights subject to the McCarran amendment, it followed that Indian water rights could be litigated and determined in an action against the United States. In short, the Court was saying that there are no Indian reserved water rights but, rather, only Federal water rights reserved for Indians.

I make these remarks because, in my view, it is wholly erroneous to adopt, as this Commission has, the position that tribal Indians have reserved to themselves all rights not specifically extinguished by treaty. Generalizations, such as this one, are neither accurate nor helpful in seeking to define the powers of the United States, the States, and the Indians. It may be, as in *Winans*, that the relationship between the United States and a particular Indian tribe was one of arm's-length bargaining such that it could be said that a tribe actually reserved rights to itself. On the other hand, the relationship between the United States and other tribes was characterized by war and destruction. When these relationships culminated in peace treaties, it is simplistic, to say the least, to assert that the Indians reserved anything to themselves. It is clear that in most instances, the United States as the victorious party, dictated the terms of the treaty and reserved for the Indians various parcels of land.

So, as I have rejected the broad assertion of inherent tribal sovereignty, I also reject the broad assertion that tribal Indians have reserved to themselves inherent rights to self-government and property rights. Generalizations such as these have no place in law, and must yield to a judicious consideration of relevant treaties, statutes, State enabling legislation, history, and contemporary fact.

But the nature and scope of tribal self-government is too important to be left to case by case adjudication. I recommend that Congress enact comprehensive legislation which clearly defines the nature and scope of tribal self-government and makes it clear that the governmental powers granted tribes by the Congress are limited to the government of members and their internal affairs, and are not general governmental powers.

TRIBAL JURISDICTION

Since Indian tribes are granted some of the powers of government, many of the major problems and uncertainties of American Indian law and policy resolve down to questions of jurisdiction. Jurisdiction, of course, means the power to regulate (and tax) the conduct and property of people, and the authority to enforce those regulations against unwilling persons through coercive instruments of government.

A. TRIBAL POWERS OVER NON-INDIANS

One of the most important questions of Indian law and policy is the extent to which Indian tribes should or may exercise governmental authority over non-Indians and other nonmembers. The question has profound implications in that the unwise exertion of such powers over non-Indians could have a catastrophic effect on whether Indian peoples will be left alone to make their own laws and be governed by them. The exercise of such authority would also bear upon the most valued political rights and civil liberties of those nonmembers who would be subject to the powers of tribal government. The Commission report assumes that tribal governments should grow and develop into "fully functioning governments," which "necessarily encompass the exercise of some tribal jurisdiction over non-Indian people and property." I disagree, as I think the vast majority of the American people would disagree.

1. Theoretical Considerations

Whether Indian tribes are to exercise governmental authority over nonmembers goes to the very roots of Indian law and policy. The question ultimately goes to what the purposes are for allowing Indian tribes some of the powers of government, or whether indeed those powers are not tied to any specific ends at all. The question is whether Indian governmental power is an instrument of Federal policy defined by its ends or whether it is an absolute prerogative without a limiting purpose.

Indian peoples do not have and have not been accorded any right of government good against the sovereignty of all the people. They are not given the power of government for its own sake. Rather, it is the policy of the United States to allow some Indian peoples to exercise some governmental powers over themselves for a purpose. The purpose is to allow peoples of distinct cultures, most of whose ancestors were present in this land before the non-Indians came to it, to decree their own norms of conduct and to control their affairs so as to preserve their own cultures and values.

The Federal purpose is to allow some Indian peoples to preserve the uniqueness of their own cultures and values by insulating them from the general municipal powers of the States. It is feared that their distinctive heritages and values could be unduly burdened if Indians were answerable for all the obligations and duties imposed upon the general populace by collective decisions reflective of the culture and values of the non-Indian majority.

Some Indian peoples enjoy, therefore, a unique exception to our deeply felt view that the powers of government are shared by all of our citizens on an equal footing to be exercised in furtherance of only publicly shared values, and that ethnic background is not a proper criterion for making distinctions in participation in public decisionmaking. In short, it is generally felt that the power to decree standards of conduct and to compel the unwilling to conform to them is properly exercised only by a majoritarian democracy open to all citizens.

The Commission report asserts that "the ultimate objective of Federal-Indian policy must be directed toward aiding the tribes in achievement of fully functioning governments exercising primary governmental authority within [the reservations]" with authority "to do any and all of those things which all local governments within the United States are presently doing."

The American people, however, have never intended to establish Indian tribes as absolute "sovereigns of the soil" over the lands on which they reside. The only "fully functioning governments" with "primary governmental authority" in any place are the governmental units open to participation of all citizens, regardless of race, birth, or the uniqueness of their cultural heritages. As has been stated previously, we acknowledge one sovereign, all the American people, who have expressed their exclusive sovereignty in the United States Constitution, which allocates all power to the United States, to the States, to all the people, and to no one else.

In summary, the American people have not surrendered to Indians the power of general government; Indians are given only a power of self-government. They have the power to regulate only their members and the property of their members. They have some governmental powers because and to the extent that such powers are appropriate to the Federal policy of allowing Indian peoples to control their own affairs. But there is no Federal policy of allowing Indian peoples to control the liberty and property of non-members. Tribal powers of self-government are limited by their purpose.

2. Objections to Tribal Jurisdiction Over Non-Indians

With these fundamental reflections in mind, it becomes clear that Indian tribes do not have and should not have power over non-Indians or their property, except in the narrowest circumstances. Some of the specific reasons for this conclusion can be briefly outlined.

First, power over nonmembers could only be justified under a "territorial" notion of the governmental mandate of Indian tribes. But as we have seen, the mandate of Indian tribes is not supreme within their territory; rather their mandate is purposive, and there is no Federal policy of subjecting non-Indians to a supremacy of Indians.

The American people, through the Congress, have been willing to give Indian peoples governmental powers in order to assist them in the preservation of their own cultures and values. But I do not believe the non-Indian majority ever considered that their willingness to leave Indians alone to be governed by their own laws also constituted a surrender of their own liberty and property to the control of Indian tribes.

Even if a congressional choice to subject non-Indians to tribal jurisdiction were clear, there would be serious constitutional problems, which the Commission report ignores. The Supreme Court has held that Congress may not under its power "to make rules for the government and regulation of the land and naval forces" subject civilians to criminal trial in military courts because such civilians are entitled to be tried in article III courts. *Reid* v. *Covert*, 354 U.S. 1 (1957); *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960); cf. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). There would seem to be far less authority for Congress to allow the subjection of non-Indians to general criminal jurisdiction in non-article III courts operating within the boundaries of States.

State general purpose political subdivisions may not exclude persons from voting unless the exclusion is strictly necessary to serve a compelling State interest. *Avery* v. *Midland County*, 390 U.S. 374 (1968); *City of Phoenix* v. *Kolodziajski*, 399 U.S. 204 (1970). It would be exceedingly strange if Congress could authorize a group to exercise general municipal powers over all persons within a given territory yet disqualify some persons from political participation on grounds of accidents of birth.

There is a further objection to tribal jurisdiction over non-Indians which, although it may not cross the threshold of unconstitutionality, nevertheless raises important constitutional considerations. It may be questioned whether in promoting Federal policies concerned with the relations of Indians among themselves, it is proper to grant them governmental power over others as a mere adjunct to the exercise of their powers among themselves.

Furthermore, general powers of government are far more substantial than the power to regulate commerce. Congress surely cannot exercise general municipal authority over the lives and property of citizens within the boundaries of a State on a theory that such powers are ancillary to Congress' commerce power. It would be even less likely that such general municipal power over one group of citizens could be granted to another group of citizens merely because Congress has the power to regulate commerce between the two groups.

It is also sometimes urged that tribal governmental power, including power over non-Indians, derives from tribal ownership of the beneficial interest in trust lands. But whatever authority Indian tribes may have over trust property (which is far less extensive than the prerogatives of property ownership which is not subject to Federal fee interests), those rights are ultimately rights to control property itself, not rights to control activity or property of others. Indian tribes, like other landowners, may expel trespassers or sue them for damages. But there is no doctrine whereby when entering the land of another one consents to any general lawmaking and enforcing authority of the landowner merely by virtue of being on his land.

There are few values more central to our society than the belief that governments derive "their just powers from the consent of the governed." Government by Indian tribes over non-Indians, if allowed to take place, would be a clear exception to that principle. A heavy burden of justification should fall on those who would subject some of our citizens to the coercive powers of others without any opportunity or right to join in the deliberations and decisions which determine how that power is to be exercised. Those who assert that Indian tribes should be allowed to rule non-Indians offer little justification other than an appeal to the abstraction of "sovereignty". But our society sees no distinction between the rulers and the ruled; all citizens enjoy both statuses. There is little reason shown why academic deductions from the metaphor of "sovereignty" should take precedence over the Declaration of Independence and the first principles of democracy.

Consequently, it is all the more inappropriate that Indian tribes should exert governmental power over resident non-Indians who plainly would be entitled to vote and participate in tribal government were it not for the accident of their race. But of course, it would frustrate the whole purpose of allowing Indian self-government to require them to allow nonmembers also to participate in their "self" government. Once participation is opened up beyond the Indian peoples themselves, the governmental unit has abandoned its very purpose for existing—to allow Indians to make their own laws and be governed by them. Once political participation is extended beyond Indians themselves, there is utterly no reason for having Indian governments separate from political subdivisions of a State.

The recent case of *Oliphant* v. *Schlie*, 544 F. 2d 1007 (9th cir. 1976), *cert. granted* (June 13, 1977), recognizing that it is the first court to address the question in 100 years, holds that Indian tribes may prosecute on-Indians in tribal courts for criminal violations on the reservations. The majority opinion in *Oliphant* upholds the jurisdictional claim over non-Indians on the theory that Indian tribes have all powers which have not been forbidden to them and that Congress has never spoken to the question of jurisdiction over non-Indians. This view, of course, inverts the proper analysis and ignores history. The scholarly dissenting opinion of Judge Kennedy correctly points out that such jurisdiction has generally not been asserted and that the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction, not an implication that tribes should have such powers. The *Oliphant* case does not dispose of the question, and even if it is upheld by the United States Supreme Court, the Congress must still decide whether Indian power over non-Indians is wise.

3. Tribal Courts

Even assuming that Indian tribes should and may proscribe the standards of conduct and the civil and criminal liabilities of non-Indians within Indian reservations, it would be even more inappropriate for Indian courts to exercise criminal or civil jurisdiction over unwilling non-Indian defendants.

Again, the courts of tribal governments can have no broader reach than the purposes for which Indian tribes are granted governmental power in the first instance. That purpose is to regulate the Indians' affairs among themselves. The only purpose of subjecting non-Indians to the enforcing powers of tribal courts would be to allow Indians to govern non-Indians.

Nor can it be said that tribal criminal enforcement against non-Indians should be allowed in order to fill a gap in the preservation of law and order on the reservation. To the extent that State criminal laws apply of their own force to non-Indian activities on reservations, non-Indian violators can be prosecuted in State courts. Where Indian peoples feel that States are applying insufficient manpower to the enforcement of State laws against non-Indians, that problem can be met by cross-deputizing tribal police as State peace officers. The cross-deputized tribal/State peace officer would then have authority to initiate prosecutions against non-Indians in State courts when the tribal officer apprehends the non-Indian breaching the peace.

To the extent that State law may not apply of its own force to non-Indian lawbreakers on the reservation. State law would nevertheless apply indirectly through the Assimilative Crimes Act, 18 U.S.C. § 13, enforcement of which is in the Federal courts. See 18 U.S.C. § 1152.

In summary, there is no lack of enforcing authority which would show a practical necessity for subjecting non-Indians to criminal prosecution by the arm of a quasi-governmental entity from which they are excluded from political participation because of accidents of birth.

Reservation Indians in States which have neither been granted nor assumed jurisdiction under Public Law 280 are immune from suit in the State courts for causes of action which arise on the reservation.

Such Indians may be sued only in the tribal courts. Indians may, however, have access to the State and Federal courts on the same footing with all other persons. Some Indian tribes have claimed authority for their courts to hear claims against nonmembers. See *Cowan* v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975).

There is no justification for the exertion of civil jurisdiction against unwilling non-Indian defendants in tribal courts. The State or Federal courts are fully capable of hearing all such claims. It would be a drastic turnabout of Federal Indian policy to say that tribal courts may be used not as a shield but as a sword to assert claims against non-Indians. Again, the fundamental question involved is whether Indian government is self-government or general government. Only if the tribe enjoys general sovereignty of the soil can there be any justification for their courts exercising jurisdiction over nonmembers merely because the claim arose within the geographic boundaries of the Indian reservation. Such an affirmative assertion of jurisdiction is not tied to the policy of allowing Indians to make their own laws and be governed by them but rather is a claim to make laws to govern non-Indians. Indian tribes have no such mandate from the people of the United States.

4. Full Faith and Credit

The Commission report argues strenuously that civil judgments of tribal courts should be given full faith and credit by other courts of the States and of the United States. To the extent that tribal judgments are entirely between members, do not implicate any interests of nonmembers, and are arrived at according to substantive legal rules and modes of procedure satisfactory to the Indian peoples of the tribe whose court has entered the judgment, I see no substantial reason why such judgments should not be afforded full faith and credit. However, judgments against unwilling non-Indian defendants should not be afforded full faith and credit. Since such assertions of civil jurisdiction over non-Indian defendants exceed the jurisdiction of tribal courts, judgments against such defendants would not be entitled to full faith and credit under traditional legal concepts.

The question, then, of whether Congress should require full faith and credit for such judgments raises all the same considerations of whether non-Indians should be subjected to the civil jurisdiction of Indian courts in the first place.

5. Subjection of Non-Indians to Indian Law and Courts Will Destroy the Practical Ability of Indian Peoples To Make Their Own Laws and Be Governed by Them

Arguments are often made by Indian advocates that jurisdiction over non-Indians must be granted to tribes because the lack of such jurisdiction is inconsistent with the notion of "tribal sovereignty". Admittedly, if Indian tribes were sovereign within their boundaries, it would follow that all persons within their boundaries are subject to the rule of Indians. But the premise is false. Only the people of the United States are sovereign and neither Indians nor anyone else have any claim to sovereign power good against all the people.

Furthermore, it would be disastrous to Indian interests for tribes to have power over nonmembers. If we assume that the governmental powers accorded to Indian tribes include the exercise of jurisdiction over non-Indians, then the non-Indian majority would have a vital stake in the precise content of all laws enacted by every Indian tribe and in all procedures utilized by them to enforce their laws. To the extent that non-Indians are subject to the rule and the process of Indian quasi-governments, all non-Indians have a direct stake in how those governmental powers are exercised by Indian tribes. Congress would have no choice but to closely supervise Indian governmental decisions in a way which would totally frustrate the very purpose of giving Indians governmental powers in the first place.

This point could be illustrated in many ways, but let us look specifically to the effect that tribal court jurisdiction over non-Indians would have on the Indians' ability to decide how their courts shall operate. If the liberty, property, and financial security of non-Indians are to be at the mercy of Indian judges hearing claims by their constituents against non-Indians, the non-Indian majority will justly demand the same degree of procedural exactitude and published rules of law which they are used to enjoying in the courts of the States and of the United States. We have complex procedural systems designed to assure correct and fair decisionmaking. We also have appellate review to assure uniformity in decisionmaking and to minimize the possibility of bias or error in individual cases. Where the rights of litigants involve questions of Federal law we have a right to seek review in the United States Supreme Court.

Indian tribal courts by contrast have very few of these complex assurances of fairness and accuracy in decisionmaking. Few tribal judges are trained in the law of the States and of the United States, and few tribes have systems of appellate review. Apparently none publishes appellate decisions. There is no appeal to the authoritative sources of law whether it be the highest court of the State or the United States Supreme Court.

The Indian Civil Rights Act of 1968 provides some limited review in the Federal courts for decisions of tribal courts insofar as those decisions impinge on minimal constitutional guarantees. But there is no review in Federal courts for decisions of Indian courts which are merely erroneous unless the error reaches constitutional magnitude or it deprives one of personal liberty.

While Indian peoples should be largely free to choose whatever quality of judicial process they wish to have for themselves, most of the non-Indian majority will insist upon having for themselves ample assurances of fairness, competence, and correctness of decisions. The absence of appellate review would be especially intolerable, and Congress would surely require tribes to provide for it. Indeed, Congress would be remiss in its duty to the non-Indian majority if it did not prescribe high standards of legal process according to the expectations of non-Indians, if non-Indians are to be subject to tribal courts.

Consequently, it would be profoundly unwise for Indians to force non-Indians to become involved in the details of tribal government by asserting jurisdiction over non-Indians. Indeed, as has been expressed above, once Indian tribes have assumed regulatory and court jurisdiction over non-Indians, the entire justification for allowing Indian peoples the limited governmental powers they enjoy will have vanished.

6. Recommendation for Legislation

I recommend that Congress enact legislation directly prohibiting Indian courts from exercising criminal jurisdiction over any person, whether Indian or non-Indian, who is not a member of the Indian tribe which operates the court in question.

I further recommend that Congress enact legislation prohibiting Indian courts from exercising civil jurisdiction over any person, whether Indian or non-Indian, who is not a member of the tribe which operates the court in question, unless the non-Indian defendant expressly and voluntarily submits to the jurisdiction of the tribal court after the claim arises upon which suit is brought.

B. CONFUSION OVER ALLOCATIONS OF JURISDICTION BETWEEN STATES AND TRIBES

One of the most important and perplexing questions in Federal Indian law and policy is the allocation of powers between States and Indian tribes. The problems are enormous and their ramifications extensive, and it is especially regrettable that the Commission, rather than thoroughly and fairly analyzing the many problems, chose instead to write a party tract uniformly advocating the maximum extension of tribal jurisdiction at the expense of State jurisdiction. In writing these minority views we cannot do in the short space of a few weeks what the Commission was supposed to have done in a year's time. However, these minority views will attempt briefly to outline some of the major considerations which should go into any fair-minded attempt to divide jurisdiction between States and tribes. The inadequacy of present laws to fairly allocate those powers will then be discussed, along with some special problem areas.

Several major principles concerning the allocation of powers between States and tribes can be stated summarily. States do not have governmental power over reservation Indians for their activities on the reservation unless expressly granted by the Federal Government. *McClanahan* v. *Arizona State Tax Commission*, supra. States do have power over the off-reservation activities of reservation Indians. *Mescalero Apache Tribe* v. *Jones*, supra. However, Indian reservations are part of the States within whose boundaries they are situated, and the States' powers over their territory are limited only to the extent that Federal law mandates restrictions on those powers. States enjoy comprehensive power over non-Indians and their activities on reservations, unless such State jurisdiction is expressly precluded or preempted by Federal law. State jurisdiction may also be barred under the nebulous doctrine against "infringement of tribal self-government". *Williams* v. *Lee*, supra.

The ultimate goal in allocating powers and responsibilities between tribes and States is to do so in a fashion appropriate to the legitimate interests of each political body. More specifically, States should not be allowed powers which in fact hamper the Federal purpose in giving Indian tribes governmental powers in the first instance—to allow Indian peoples to make their own laws and to control their own internal affairs. (But to the extent that national policy wishes to see reservation Indians enjoy the benefits they would otherwise derive from participation in the affairs of the State government, but which they are not required to support, it is only fair for national policy to look to the tribe or to the national government to provide those benefits.)

Another goal of the allocation of powers is to avoid misallocation of economic cost and benefits. The division of powers should be such that the Indian reservations do not become jurisdictional islands from which activities which significantly affect the States' interests can be conducted outside the reach of the States' power to regulate them. Similarly, Indian reservations should not be allowed to become jurisdictional islands to which non-Indians can, for the sole purpose of escaping State authority, easily relocate their activities which would otherwise transpire off the reservation.

Absent Federal statutes, the courts have evolved a vague and indefinite "rule" for determining when State jurisdiction over non-Indians for their activities transpiring on Indian reservations is to be precluded. The rule is the "infringement of tribal self-government rule" articulated in *Williams* v. *Lee*, and explained in *McClanahan* v. *Arizona State Tax Commission.*

In *Williams* v. *Lee*, 258 U.S. 218 (1959), the court stated:

> Essentially, absent governing acts of Congress, the question has always been whether state action infringed on the right of reservation Indians to make their own laws and be ruled by them. 358 U.S. at 220.

In *McClanahan* v. *Arizona State Tax Commission*, supra, the Supreme Court made clear that the *Williams* v. *Lee* "infringement" rule is meant to test the permissible scope of State jurisdiction over the non-Indian aspects of transactions on the reservation involving both Indians and non-Indians:

> In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the state could protect its interests up to the point where tribal self-government would be affected. 411 U.S. at 179.

Where State jurisdiction over reservation activity of non-Indians will in fact impair legitimate tribal power, State jurisdiction must yield even though the State may otherwise have legitimate claims to regulate.

The "infringement" rule has proved to be a very poor discriminator between permissible and impermissible State jurisdiction because the rule does not identify what the "legitimate governmental interests" of tribes are over transactions involving both Indians and non-Indians. The lower court decisions applying this test are utterly irreconcilable.

The "infringement" test is further plagued by a tendency by some courts to confuse "self-government" with "sovereignty", a confusion zealously cultivated by some Indians and their lawyers.

It is clearly beyond the scope of these minority views to articulate a comprehensive statement of how State/tribal allocations of power should be made, but several obvious suggestions can be made for improving the "infringement" rule.

No infringement of tribal self-government should be found unless the non-Indian activities over which State jurisdiction is sought are part of a complex of activities which are substantially Indian in character. This threshold requirement of "substantial Indian involvement" is necessary to assure that non-Indians are immunized from State law cnly where it is incidental to and necessary for insulating Indians from State law.

As a closely related requirement, immunity-motivated conduct of non-Indians should *not* be immune from State law. Where transactions take place or take a particular form precisely because of hoped-for immunity to non-Indians, no tribal interest is truly implicated other than possible tribal desires to "franchise" their immunities to non-Indians. But such "interests" are not legitimate. Otherwise it would be possible for Indians to "market" immunity from State law by inducing essentially non-Indian activities to relocate on the reservation and by coloring them with a mere form of Indian involvement. For example, in a number of recent cases Indian tribes have entered into long-term leases of trust land to non-Indians for development and subdivision to other non-Indians. The courts have uniformly held that States may tax the leasehold interests of such non-Indian lessees and sublessees, even though there is a clear effect on Indian interets. E.g., *Chief Seattle Properties, Inc.* v. *Kitsap County*, 86 Wash. 2d 7, 541 P. 2d 699 (1976); *Fort Mohave Tribe* v. *County of San Bernadino*, 543 F. 2d 1254 (9th Cir. 1976).

There are also areas in which unitary regulation is necessary and therefore Indian reservations should be subjected to State jurisdiction. One example is the control of air pollution, which respects no political boundaries. Congress has charged States with the achievement of Federal air pollution standards within their boundaries, yet it is argued that the Clean Air Act does not authorize States to apply and enforce their air pollution laws on Indian reservations. Without getting into the details of Federal air pollution statutes, it is evident that States cannot meet the problems of air pollution unless they have authority coextensive with the problem.

Many other areas of law are similarly in need of unitary regulation and enforcement. The Commission could have done a great service by identifying those areas and recommending appropriate legislation.

C. ZONING

One area in which the conflict of jurisdictions is especially troublesome is land use regulation. The very justification for land use regulation is the concern with the external effects of land use, the effects of which are felt beyond the boundaries of the particular parcel of land itself. Indian reservation land situated close to urban development presents thorny problems of inconsistent and exploitative uses between Indian and non-Indian lands.

On the one hand, it is usually felt that only the Federal Government can ultimately control the uses of Federal lands, although the practice of the Federal Government is to cooperate closely with local authorities. On the other hand, the existence of jurisdictional islands within urban areas holds out the possibility of self-interested exploitation which would frustrate the very purpose of regional land use planning.

The individualized nature of land use planning decisions has made it difficult for courts to supervise the decisions of regulatory authorities, and it is felt that the principal defense against abuse of the immense powers wielded by land use regulatory bodies is their accountability to all of the public. Sectionalism and favoritism are less likely to occur where the regulatory bodies are politically accountable to all the persons who will benefit or suffer from land use decisions.

Hence, the fractionalization of land use regulatory authority frustrates land use planning generally.

State power to regulate use of Indian trust land is uniformly prohibited. Even in States which have acquired general civil and criminal jurisdiction under Public Law 280, the most recent authority is that they may not regulate land use. *Santa Rosa Band of Indians* v. *Kings County*, 532 F. 2d 655 (9th Cir. 1975).

Some specific Federal statutes have required the Secretary of the Interior to consider compatibility with surrounding land use planning when approving leases of Indian land. But in general no attempt has been made to reconcile Indian land uses with surrounding non-Indian land use planning, or vice versa.

Again, this is a problem which would have benefited much from careful factual and theoretical analysis. The Commission has chosen to ignore this problem, probably because any fair solution to it would entail some limitations on the prerogatives now enjoyed by Indian tribes.

The problems are especially difficult with land owned by nonmembers within the boundaries of the reservation. Obviously State regulation of such land use has the potential of bearing much more directly upon surrounding Indian interests than upon nonreservation interests. But to allow tribal regulation of land uses by non-Indians raises again all the problems discussed previously concerning tribal jurisdiction over non-Indians.

The solution will probably lie in some types of cooperative arrangements among local governmental units, Indian tribes, and Federal administrators. But it would seem that there must be authority in the Secretary of the Interior to override positions of tribal leaders themselves both because the land in question is ultimately Federal in ownership and because the Secretary, unlike tribal leaders, is responsible both to Indians and to non-Indians and is therefore better able to fairly resolve conflicts that may arise between such groups.

The implementation of such cooperative land use planning would require much legislative study. The fact that it has received virtually none from this Commission is highly disappointing.

In the absence of ultimate authority over Indian land use planning lying with Federal officials, the fairest system would be to place final authority in State planning authorities in which Indians would participate equally with other affected citizens.

D. TAXATION

There is a simple and fair formula for deciding who shall be taxed by whom in Indian country. The United States should tax all persons on Indian reservations the same as it does persons elsewhere. States should tax non-Indians and their property. Tribes should be able to tax members and their property.

1. Federal Taxation

Neither Indians nor non-Indians on reservations should enjoy exemption from Federal taxation. As citizens of the United States with equal participation in and enjoyment of the benefits of the Federal Government, there is no reason why Indians, any more than anyone else, should receive favored tax treatment from the Federal Government.

2. State Taxation of Non-Indians

The courts have uniformly held that taxation of leasehold interests of non-Indian lessees of Indian land does not bear closely enough upon Federal policies in order to infringe on legitimate tribal self-government. *Fort Mohave Tribe* v. *County of San Bernardino*, supra. The Commission report suggests such taxation should be precluded. The Commission also suggests a sweeping Federal tax immunity for non-Indian activities on Indian reservations so that the tribes would be free to assert or decline taxing authority over such non-Indian activities. The Commission would also shift to the State the burden of proving that taxes on non-Indian activities within Indian reservations do not interfere with tribal self-government.

This is but another example of the majority's attempt to color Indian tribal authority within their reservations as a general territorial authority, rather than a purposive authority limited to regulating the conduct of Indians themselves. The suggestion also totally ignores the legitimate interests of states in deriving tax revenues from activities of their non-Indian citizens. Typically, non-Indians conducting activities on an Indian reservation take advantage of the whole panoply of State benefits and services. They enjoy the benefits of State law and travel off the reservation in connection with their activities on the reservation. There is simply no justification for preventing States from levying nondiscriminatory taxes against non-Indian activities merely because those activities are situated on Indian reservations and Indians would profit from selling immunity from State taxes.

The broad immunity for non-Indians suggested by the Commission would also result in large-scale tax-motivated relocation of non-Indian activity onto Indian reservations. It is not, and never has been, Federal Indian policy to allow Indian tribes to market immunity from State laws by selling the privilege to locate activities on Indian land. *Fort Mohave Tribe* v. *County of San Bernardino*, supra.

3. State Taxation of Indians

States may not tax reservation Indians or their property when situated on their own reservations. However, when Indians go off the reservations, they become generally subject to the law of the State, including tax laws. Mere status of the reservation Indian does not grant one a personal immunity from the obligations of State law when one leaves the reservation and takes advantage of the protections of State law off the reservation. The proper statement of State power to tax Indians is that contained in the report of the Western State Tax

Administrators discussed in the majority report. The State may not impose taxes, the legal incidence of which falls upon reservation activities or property of Indians. However, States may tax the reservation activities or property of non-Indians and Indians who are not members of the tribe on whose reservation they are found. Since nonmember Indians have no right to participate in the government of a tribe to which they do not belong, it would be contrary to the purposes of Federal Indian policy and invidiously discriminatory against non-Indians to allow non-member Indians immunity from State law and taxation merely because they are Indian.

4. Tribal Taxation

It may be seriously doubted whether Indian tribes enjoy the power to tax. A few old, lower court cases, none less than 70 years old, recognize that power. In any event, I have no quarrel with tribal powers to tax, as long as the power is limited to taxation of members and their property. Taxation of their own members and property would be an appropriate way of financing the Indians' government of themselves.

The majority asserts the tribe should be free to tax non-Indians and their property situated on reservations. Again, they deduce this power from the assumption that Indian tribes are general governmental units with authority over all things and persons within their boundaries. Taxation of non-Indians and their property would be especially pernicious because of their exclusion from participation in the political processes which control the supposed power. The majority weakly suggests that non-Indian interests would be adequately protected by judicial review in the Federal courts once tribal taxation becomes confiscatory. Assuming that the doctrine against confiscatory taxation retains any vitality in contemporary constitutional law, this remedy would be blatantly inadequate to protect all the legitimate interests of non-Indian taxpayers. Those who pay taxes are entitled to be concerned about the level of taxes and uses to which they are put long before the taxation becomes confiscatory.

Apparently feeling the weakness of its position, the majority suggests that "any tax assessed and collected from a resident nonmember may have to bear a reasonable relationship to a service provided or available to such resident nonmember." But the majority fails to suggest how any teeth could be put into this restriction.

Tribes have no power to tax non-Indians or their property because tribes have no power at all over non-Indians or their property. Again, Indian tribes have a limited privilege to govern themselves; they have no general power of government within the boundaries of their reservations.

There are also serious constitutional values implicated in any attempt by Indians to tax non-Indians. Some Indian tribes enjoy governmental powers only because and as long as Congress, as a matter of national policy, thinks it is wise that they have such powers. Were it not for the Federal immunity, Indians would be entirely subject to the sovereignty of the States in which they are present.

It would be irrational for Congress to tolerate a system wherein the costs of Indian tribal separatism are not to be borne by all the taxpayers of the United States, but rather are to be borne inordinately by those non-Indian taxpayers who, by accident, conduct activities or have property on Indian reservations. While Congress may insulate Indians from State law and may subsidize their efforts at government and social welfare, I seriously doubt that Congress could levy a tax on persons or property situated on Indian reservations and then remit those tax funds to the Indian tribes. The same result is achieved by allowing Indian tribes to tax nonmembers on their lands. It is a denial of due process of law for Congress to tolerate a scheme in which the financial burden of supporting Indians and Indian government falls disproportionately on non-Indians or on non-Indian property on Indian reservations.

5. Legislative Recommendations

I recommend that Congress enact legislation confirming that States have the same power to levy taxes, the legal incidence of which falls upon non-Indian activities or property, on Indian reservations as they have off Indian reservations. The only exceptions to this blanket recognition of State taxing power over non-Indians should be in the rare situations where comprehensive Federal regulation of specific subject matters would independently preempt State regulation, including taxation, of non-Indian activities on Indian reservations. *See Warren Trading Post Co.* v. *Arizona State Tax Commission*, *supra.*

I also recommend that Congress expressly proscribe taxation of nonmembers or property of nonmembers by Indian tribes.

E. PUBLIC LAW 280

A special concern to many States is Public Law 280, under which many States have been granted or have assumed general civil and criminal jurisdiction over Indian reservations. As the Commission report indicates, Public Law 280 has been interpreted to subject reservation Indians to the States' criminal law and civil law of general applicability between private persons, and to enforcement in the State courts. The law has been interpreted not to allow application of general regulatory laws or tax laws to reservation Indians. *Bryan* v. *Itasca County.* — U.S. —, 96 S. Ct. 2102 (1976).

The effects of Public Law 280 cannot be conveniently summarized. It allows State enforcement of criminal law and provides a State civil forum for litigation against reservation Indians with certainty that the civil law of the State generally applicable to private persons will be the rules of decision in such cases. The effects of the civil jurisdictional aspects of the statute probably include the facilitating of granting credit, doing business and making investments by non-Indians on reservations by assuring a forum and a predictable body of law for the enforcement of rights that flow from such transactions. The criminal jurisdiction probably promotes law and order by providing an additional instrument of criminal law enforcement.

It is not clear to what extent the granting of criminal enforcement powers to States obligates the States to spend their funds to provide police and law enforcement services on Indian reservations. Congress' apparent refusal to allow States to require the Indian beneficiaries of State law enforcement to bear their share of the costs of that service may well indicate that the States were not thought to be obligated to provide law enforcement services.

A major problem raised by *Bryan* v. *Itasca County*, supra, is that it throws great doubt on what civil laws of the State are substantively enforceable against reservation Indians. Many States have assumed only designated subject matter jurisdictions, and there is now much doubt as to whether the laws they have purported to extend over Indian reservations are regulatory laws of the sort that *Bryan* held not to be allowed by Public Law 280.

Zoning laws, as has been stated, are held not to be applicable under Public Law 280, both because they bear upon Indian trust land and because they are usually local laws, not statewide laws. *Santa Rosa Band of Indians* v. *Kings County*, supra. The reasoning of *Bryan* v. *Itasca County* would also seem to exclude zoning regulation from the type of jurisdiction ceded to States under Public Law 280.

Bryan explicitly held that Public Law 280 did not extend State taxing laws to Indian reservations.

The present state of the law seems to be that Public Law 280, which was intended to reduce jurisdictional problems in Indian reservations, has now produced its own set of wide-ranging uncertainties about the permissible jurisdiction of States within Indian reservations.

Comprehensive congressional review of Public Law 280 is appropriate, if for no other reason than to reduce the confusion that now exists about the meaning of the statute.

The Commission report recommends that Indian tribes subject to State jurisdiction under Public Law 280 be granted the unilateral right to withdraw from such State jurisdiction. This recommendation is overbroad. Retrocession of jurisdiction should be predicated only on particular findings that State jurisdiction under Public Law 280 has resulted in actual harm to Indian culture and values. Immunity from the obligations and restrictions placed on all for public benefit will always be thought desirable by the few who would enjoy the immunity. If withdrawal from State jurisdiction is to be done on grounds of Federal policy, the policy choices should be made by Congress, which can weigh fairly the costs of Balkanizing State jurisdictions as well as the advantages to Indians.

F. NEW CIVIL JURISDICTION

In many instances, there are no judicial forums in which certain claims can be heard. Under the doctrine of *Williams* v. *Lee*, supra, Indians may not be sued in State courts for causes of action arising on the Indian reservation. But many tribes do not provide courts with civil jurisdiction, or limit the civil jurisdiction of their courts so as to exclude many types of civil claims. The result is that many civil claims against reservation Indians, whether by Indians or by non-Indians, cannot be heard. It is doubtful that these jurisdictional gaps are intentional.

The existence of these jurisdictional gaps also raises serious constitutional problems. Because of the interplay of Federal law and the absence of tribal forums, it will often happen that parties to various transactions will have or not have remedies and enforcement forums depending on their race. So, for example, where the tribe has provided no civil court, or otherwise excludes civil jurisdiction, an Indian may have relief for injuries caused by the negligence of a non-Indian. But there is no relief if the racial statuses of the plaintiff and defendant are reversed. Surely this result is neither fair nor wise. It is not constitutional for Federal law to mandate a forum and relief, say in State courts, for Indians against non-Indians, but, at the same time, to allow Indians themselves to decide whether non-Indians shall have a forum and relief against them.

Assuming the unconstitutionality of this bizarre system of relief based on race, it is not clear what the consequence should be. Perhaps non-Indian defendants of Indian plaintiffs in State courts should be allowed to raise nonmutuality as a substantive defense to the claims of Indian plaintiffs. Perhaps a non-Indian plaintiff against a reservation Indian could have a claim under the Indian Civil Rights Act to compel the Indian tribe to provide a judicial forum for him such as an Indian plaintiff would have against him in State courts.

In any event, it is surely unwise and probably unconstitutional to permit the Federal purpose of allowing Indians to make their own laws and be governed by them to reduce down to a system whereby different laws apply to Indians and to non-Indians involved in identical or the same transactions.

Congress should enact legislation allowing civil jurisdiction in State courts against Indian defendants in all cases where there would be jurisdiction in the State courts were it not for the Indian status of the defendant and where the tribal government of the Indian defendant does not provide a judicial forum to hear the claims against the Indian defendant. Tribal interests in regulating their own members could be protected by providing that tribal rules of decision must be given appropriate weight in the State court proceedings. In the alternative, Congress should bar actions by Indians against non-Indians for claims arising on reservations where tribes have not provided forums for similar actions by non-Indians against Indians.

G. INDIAN CIVIL RIGHT ACT OF 1968

The Commission report takes exception with some of the provisions of the Indian Civil Rights Act of 1968, which, for the first time, expressly subjected Indian tribes to constitutional limitations in the exercise of power. In general, the Indian Civil Rights Act is a tremendously important bulwark against the abuse of power, which Indians are no less capable of than other persons. I must dissent from various of the Commission's recommendations to restrict the Indian Civil Rights Act.

The Commission seems to suggest that there should be only Federal habeas corpus jurisdiction for violations of the Civil Rights Act. They would not allow Federal jurisdiction over tribal officials who violate the constitutional rights of citizens, unless the violation restricts the personal liberty of the victims, such that a writ of habeas corpus could issue. There is no justification for such a restriction on Federal court vindication of federally protected rights against abuse by tribal officials. By definition, the Federal courts do not grant relief against tribal officials unless they have violated the Federal rights of citizens. The demand for restriction on Federal jurisdiction is a demand for a license to infringe federally protected constitutional rights.

The Commission also suggests that requirements of exhausting tribal remedies before having access to Federal courts to redress tribal deprivations of constitutional rights should be strictly adhered to. I favor the more flexible approach to exhaustion which the Federal courts have taken. No mechanical rule can be prescribed in advance, and the courts should be free to protect constitutional rights whenever in the circumstances of particular cases it appears that it would not be beneficial to pursue tribal remedies.

The Commission also suggests that Federal court review of unconstitutional tribal action should be restricted to a review on records made in tribal court. There is no justification for this restriction on the ability of Federal courts to protect constitutional rights. The suggestion would, in effect, transform Federal jurisdiction under the Indian Civil Rights Act into appellate jurisdiction rather than original jurisdiction. The suggestion is ultimately grounded in a desire to insulate unconstitutional tribal action from close scrutiny of the Federal courts. I see no sense in Congress providing Indian and non-Indian peoples with constitutional rights good against Indian governments but then restricting the Federal courts' power to enforce those rights by requiring the Federal courts to limit themselves to the records of, or otherwise defer to the judgments of, the very agencies which perpetrate the constitutional violations.

The Commission objects that the jury trial requirements of the Indian Civil Rights Act are unduly burdensome on Indian governments. While it may well be true that many Indian courts are not well equipped to provide jury trials, this argument weighs against allowing such Indian communities to exercise governmental powers; it does not argue in favor of abridging the traditional procedural rights of our citizens. If the minimal constitutional protections which all our people cherish are too burdensome for Indian tribes to provide, then they should leave criminal law enforcement to those agencies which will provide them.

I likewise dissent from the Commission's recommendations that Indian tribes be allowed to fine criminal defendants up to $1,000 and imprison them for up to a year, rather than the $500 and 6-month limitations which now exist.

Finally, the Commission's recommendation that tribal sovereign immunity from Indian Civil Rights Act suits be expanded is at best shortsighted. If Indian governments are to exercise governmental powers as licensees of the United States, it is imperative that they be fully answerable for the improper exercise of those powers. Tribal sovereign immunity should be drastically reduced, if not eliminated. It should not be allowed to interfere with Federal court enforcement of federally protected civil rights.

II. FINANCING PUBLIC SERVICES

A major problem in the present allocation of State/tribal jurisdiction is the fairness of the allocation of costs of government and public services. This has already been alluded to in the discussions of taxation and Public Law 280. Present law is somewhat schizophrenic about whether reservation Indians should be entitled to the benefits of State and local governments, but at the same time not pay their fair share of the costs. For example, Public Law 280 gave State governments authority to enforce their general criminal and civil laws against all persons on Indian reservations in six designated States and allowed other States to assume similar jurisdiction. Yet, last year, the Supreme Court held in *Bryan* v. *Itasca County*, supra, that such States did not have authority to tax the personal property of Indians who were to be benefited by the provision of general law enforcement in their communities by the State. Assuming that residents of Indian reservations are primarily benefited by law enforcement services, it would seem unfair that States should have to provide law enforcement for reservation Indians but that those persons not have to bear their fair share of financing those services. If it is national policy that Indians not have to pay taxes to States, but also national policy that Indians have the services that citizens and taxpayers of the States are entitled to, then it should also be a national, not a local responsibility to fund the services that national policy wishes Indian peoples to have but not to pay for.

To the extent that chosen national Indian policy entails financial burdens on persons other than Indians, it is neither fair nor rational for those burdens to be cast disproportionately on the taxpayers of the States in which Indian reservations are situated.

I. DEFINITION OF "INDIAN COUNTRY"

"Indian country" has generally been understood as meaning those areas within which Federal laws concerning Indians apply. The term has undergone a variety of legislative definitions. For the latter part of the 19th century and the first half of the 20th century, there was no statutory definition of Indian country at all. In 1948, Congress enacted a definition of Indian country for purposes of Federal criminal jurisdiction:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151.

But there are other discrete categories for which there is need of geographic limitation to governmental powers. Those categories include the following:

1. The area within which Federal civil statutes concerning Indians apply.
2. The area within which tribal civil and criminal laws apply to members.
3. The area within which State laws do not apply to members of the tribe.

4. The area within which State laws do not apply to nonmembers.

Tribal laws and enforcement institutions should not apply to non-Indians; however, if they did, the area within which non-Indians are subject to tribal law and courts could constitute another category.

It is evident that the phrase "Indian country" is often used to refer to any and all of these discrete categories. But it is also evident that the phrase "Indian country" should not have the same reference for all these different purposes.

Congress may well wish its criminal laws concerning Indians to apply broadly. But that does not suggest Congress also intended tribal power over members to reach equally as far. Assuming Congress intended tribes to have power over non-Indians, the territorial scope of that power could well be intended to be even narrower. And it may be that the reach of Federal criminal statutes is broader than the area within which Indians are to be immune from State civil laws and courts.

The need for definition of the territorial reach of these different types of powers and immunities, together with the impossibility of fashioning judicial definitions, has led the Supreme Court to rely on 18 U.S.C. § 1151 for marking off the immunity of Indians from State civil jurisdiction, even though the statute defines "Indian country" only for purposes of application of Federal criminal laws. *DeCoteau v. Dist. County Court*, 420 U.S. 425 (1975).

There is uncertainty about the meaning of "Indian country" which only Congress can cure. Worse yet, there is danger that misuse of the statutory definition of "Indian country" given in 18 U.S.C. § 1151 for purposes of Federal criminal jurisdiction will result in inappropriate extensions of tribal powers and restrictions on State power. Congress should undertake to define "Indian country" for the various purposes for which the term is used.

J. CONCLUSION

There is a welter of confusion in the present law over the jurisdiction of Indian tribes, the States and the Federal Government. Such jurisdictional uncertainties result in inability to act for ignorance of what laws and enforcement institutions will be brought to bear and result in vast waste of economic resources in the litigation of jurisdictional questions. There is a preoccupation with questions of who has power and what that power is, rather than with how power should be wisely exercised. Indeed, the majority identifies litigation of jurisdictional disputes as a special area requiring Federal financial subsidies to Indian tribes. All this confusion is of Congress' making by act and by omission. The courts have dealt with the problems on an ad hoc basis for more than 100 years, but they have not dealt with them well.

In light of this great uncertainty, and the great costs and burdens of that uncertainty, it is mindboggling that the Commission could suggest that no legislative solutions to the problems of jurisdiction should be undertaken at this time. The Commission probably takes this position because it fears that, if Congress were to carefully inform itself on the jurisdictional confusion and misallocations which now exist, it would resolve the uncertainties and reallocate powers in ways distasteful to the champions of tribal absolutism. My view is that Congress should undertake a comprehensive reexamination of Indian jurisdiction in light of Federal Indian policy and legitimate State interests and then legislate clear and purposeful divisions of power which will allow tribes and the States to generate more good government and less litigation.

FEDERAL INDIAN TRUST RELATIONS AND SOCIAL WELFARE PROGRAMS

Under the guise of legal obligation, the Commission report proposes various and vast social programs for Indians in education, health, and tribal self-government. It has done this under the umbrella of a doctrine which the Commission itself creates and labels the Federal trust responsibility. Though the doctrine appears throughout the report, it is the major subject of chapter four. The fallacy of the doctrine as it is created by the Commission is that it confuses the content of the duties of a fiduciary with the existence of legal duties in the first instance. The Federal trust responsibility as created, defined and promulgated by the Commission has no foundation in the law.

The legal duties of the United States are created by congressional treaty and statute, and are refined and defined by Supreme Court decision. Beyond those duties undertaken by treaty or statute (and contracts executed pursuant to them) the United States is subject to no "legal" duties to Indian tribes. What Congress does in the area of Indian affairs it does by voluntary choice, not under the constraints of any legal obligation.

Because the United States has assumed the role of trustee with respect to some tribal assets, the Commission would also have us believe that the United States is under a permanent legal obligation to do all things helpful to the protection and enhancement of Indian lands, resources, tribal self-government, culture, prosperity, and material well-being. In addition, the Commission charges that the entitlements under its new found obligation of the United States run to all Indians wherever they may be located, however assimilated, and whether or not they retain any ties with Indian culture or tribal self-government. In short, in seeking to find some nonexistent legal basis for the creation of a special status for Indians, the Commission has created a new doctrine, unknown to the law. This would convert tribal political aspirations into legal doctrine without the necessity of going through our democratic political processes.

This concept cannot prevail. The Commission report goes so far as to say that its version of a "trust responsibility" is merely a congressional recognition of existing law. It is one thing to ask for programs and changes in policy. It is quite another to create a legal theory out of whole cloth and then tell the Congress that what one is asking for is already a legal obligation of the United States.

As I mentioned, the fundamental fallacy with this Commission's new trust responsibility doctrine is that it confuses the existence of legal duties with the standards applicable to their exercise. Now, the existence of legal duties which run from the United States and go to

Indian tribes are created by the Congress formerly under its treaty ratification power, and currently under the exercise of its plenary power to regulate commerce with Indian tribes under article I, § 8(3) of the Constitution. Legal duties, therefore, arise only as they are undertaken in treaties and statutes of the United States. Once the Congress creates the legal obligation, then it is the responsibility of the executive branch to discharge those obligations. If the treaty or statute relates to tribal assets held in trust by the United States for the benefit of a tribe, then the United States must discharge its legal duties in accordance with fiduciary standards. For example, in *Seminole Nation* v. *United States*, 316 U.S. 286, 62 S. Ct. 1049, 1954–55 (1942), it was held that payment of funds by the United States through the Department of the Interior at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation. Note that the fiduciary duty grew out of treaty obligations. The legal obligation itself was the result of a treaty. In the exercise of that obligation, the Government had a fiduciary duty.

Note that the fiduciary duty arises when the United States discharges its duties, which duties are to be found in some independent document under which the United States holds property as trustee for a tribe. So, for example, in *United States* v. *Mason*, 412 U.S. 391, 93 S. Ct. 2202 (1973), the United States served in a fiduciary capacity where tribal assets had been "placed in trust", 93 S. Ct. at 2205, pursuant to statute. The trust was created by statute and in discharging its obligations the United States acted as a fiduciary. Note that the statute or treaty creates the legal obligation, and in both of these cases the fiduciary obligation arose from the United States' holding of tribal assets in trust. Some courts, though not the United States Supreme Court, have extended the trust principle to general statutes which relate to assets in general, even though the United States is not holding them as a trustee. But even in this instance, the duty arises out of statute and the duty relates to tribal assets. So, for example, in *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370 (1st Cir. 1975), the United States Court of Appeals for the First Circuit held that the Non-Intercourse Act imposed upon the Federal Government a fiduciary role with respect to the protection of the lands of the tribe covered by the Act. I think the court was in error in applying this principle to lands claimed by aboriginal possession which were not held in trust by the United States. But, even under this expansive notion, the court said:

> We emphasize what is obvious that the "trust relationship" we affirm had as its source the Non-Intercourse Act, meaning that the trust relationship pertains to land transactions which are or may be covered by the Act, and is rooted in rights and duties encompassed or created by the Act. 528 F. 2d at 379.

Note that the Commission's version of a Federal trust responsibility extends beyond the fulfillment by the United States of fiduciary duties over tribal assets held in trust to include enhancing those assets and tribal self-government itself. There is no responsibility in terms of legal obligation for the United States to enhance tribal assets. The United States has the role of a fiduciary when it holds tribal assets, but the United States has no general obligation to enhance the interests of all American Indian tribes and further their self-government. These matters are rightfully policy decisions to be made by the Congress. They are hardly legal obligations. In this regard, the United States Court of Claims stated the applicable principle of law in *Fort Sill Apache Tribe of State of Oklahoma* v. *United States*, 477 F. 2d 1360 (Ct. Cl. 1973) when it affirmed the denial by the Indian Claims Commission of a claim that the United States had a duty to protect the structure and existence of a tribal unit. The court looked to the applicable treaty, found that all parties violated it, and, therefore, noted that no special relationship on the part of the United States was created. The court added that, in any event, the treaty contained no language implying a duty upon the United States to protect the structure and existence of the tribal unit. 477 F. 2d at 1365–66. The court next looked at the Non-Intercourse Act and said:

> In short, the Indian Trade and Intercourse Acts have consistently been interpreted as creating obligations on the part of the United States to protect the Indian tribes in dealings involving the disposition of their lands. The special relationship created by this statute, as amended, has never been extended to the intangible factors of tribal well-being, cultural advancement, and maintenance of tribal form and structure, 477 F. 2d at 1366.

The point, though simple, has eluded the Commission. The Congress may choose to enhance tribal self-government, but it has no duty to do so. The Congress may choose to provide services for reservation Indians, but it has no duty to do so. If the Congress does act, then the legal duties of the United States are those arising out of specific congressional enactment. And, the officials of the executive branch must then discharge the duties of the United States in accordance with the relevant enactment. Where the enactment creates an express or implied trust giving the United States legal title to tribal assets for the benefit of the tribe, then the United States, as a trustee, must discharge its duties consistent wth fiduciary standards.

Making no distinction between legal arguments and policy arguments, the Commission then argues that included in the United States' trust responsibility would be those economic and social programs necessary to raise the standard of living and social well-being of the Indian people to a level comparable to that of the non-Indian society. The Congress has no such duty. It is axiomatic that the Congress has and hopefully will continue to enact economic and social programs for the benefit of tribal Indians, but this is a matter of legislative policy, not of legal obligation.

In this regard, the Commission would have the "trust responsibility" it creates run through the tribe to the Indian whether on or off the reservation. This would in effect create a special class of people entitled to Federal services and benefits solely on the grounds of race and without regard to whether such services and benefits relate to tribal self-government. This raises serious policy questions and, indeed, constitutional questions. In *Morton* v. *Mancari*, 417 U.S. 535, 94 S. Ct. 2474 (1974), the Supreme Court held that the employment preference for qualified Indians in the Bureau of Indian Affairs contained in the Indian Reorganization Act, 25 U.S.C. § 461 et seq., did not constitute racial discrimination in violation of the 5th amendment. The Court said that the preference is not directed toward a racial group consisting of Indians but instead applied only to members of federally recognized tribes. This operated to exclude many individuals who were racially classified as Indians. Because of this the Court referred to the preference as political rather than racial in nature. 94 S. Ct. at 2482 n. 24. The Court noted that the preference applied only to employment in the Indian service. Had the preference covered other Government agencies, the Court would have been presented with the "obviously more difficult question . . . presented by a blanket exemption for Indians for all civil service examinations." 94 S. Ct. at 2482. The rule adopted by the Court was that legislation that singles out Indians for particular and special treatment will be upheld as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. 94 S.Ct. at 2485. To the same effect is *Delaware Tribal Business Committee* v. *Weeks*, — U.S. —, 45 U.S.L.W. 4202, 4205 [February 23, 1977].

It may be that as long as services are extended to members of a tribe, such legislation would not violate the 5th amendment. But serious policy objections remain.

What are the problems associated with giving Federal services to tribal Indians wherever located and however assimilated into the dominant society? The Commission would have us create a vast Federal social welfare system applicable only to Indians wherever located and regardless of their nexus to Indian country and tribal self-government. When Indian law and policy go from dealing with Indians in Indian country because they are members of tribes to dealing with Indians wherever located and regardless of assimilation, then the objectives have shifted from the preservation of tribal cultural identity and separation to the treatment of Indians, qua Indians, as a special and preferred class of people. The shift cannot be tied rationally to Congress' purpose of permitting reservation Indians to make their own laws and be ruled by them.

Another recommendation based in its trust principle (recommendation B of chapter four) asks the Congress to impose limitations upon itself in its exercise of its constitutional power to deal with Indian tribes even though such limitations are not found in the Constitution. The recommendation asks that (1) treaty or nontreaty rights protected by the trust responsibility, whatever these may be, not be abrogated without the consent of the tribe except under extraordinary circumstances where a compelling national interest requires otherwise, and (2) with or without tribal consent, such rights shall not be abrogated except pursuant to congressional act which identifies the specific affected right and which states that it is the intent of Congress to abrogate such right. As a matter of policy, this recommendation is an interference with Congress' exercise of its own power. As a practical matter, such self-imposed limitations would not be enforceable. Congress has and must have the power to repeal treaties and statutes relating to Indians. For example, under the expansive notion of trust responsibility advanced by the Commission, if Congress were to pass a provision providing for health care with respect to Indians, Congress, if it adopted this recommendation, would be unable to repeal or modify such legislation except under extraordinary circumstances where a compelling national interest required otherwise.

Congress has the power to repeal a treaty by unilateral action. *Head Money Cases*, 112 U.S. 580, 599 (1884) (a treaty is subject to such acts as Congress may pass for its enforcement, modification, or repeal). To the same effect are *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) and *Stevens* v. *Cherokee Nation*, 174 U.S. 445, 483 (1889). Many examples of essential abrogations of treaty rights come to mind but let us take, for example, one that was actually adjudicated. By the Act of June 2, 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 1401(a)(2), the Congress declared that all noncitizen Indians born within the territorial limits of the United States would be citizens of the United States. In *Ex Parte Green*, 123 F. 2d 862 (2d Cir. 1941), cert. denied, 316 U.S. 668 (1942), an Indian was inducted into the United States Army. He claimed that he was not a citizen of the United States within the meaning of the Selective Service Law and that the attempt by Congress to make him a citizen under the 1924 Act violated treaty rights. He argued that his tribe had never been conquered by the United States. The court denied his claim and held that even if his treaty argument were valid, where there is a conflict between a treaty and a subsequent statute, the statute prevails.

Suppose now that Congress were to adopt recommendation B now under discussion. In order to make all noncitizen Indians citizens of the United States, the Congress would first have to see whether or not the treaty rights or even the nontreaty rights "protected by the trust responsibility", whatever that means, were affected. If so, the consent of the tribe would have to be sought except in instances of compelling national circumstances. But with or without tribal consent, the Congress would have to identify each specific affected right and state that it was the intent of Congress to abrogate the right. So, to make Indians citizens of the United States, the Congress would have had to examine every Indian treaty. This sort of interference with the legislative process is unacceptable. The Congress has the power and the duty to declare law and policy, and cannot straitjacket itself.

Beyond the practical problems associated with recommendation B is the unenforceability of any such legislation. Suppose, for example, the Congress adopted recommendation B but then proceeded to ignore it. Since subsequent statutes repeal prior ones, and since the self-imposed limitation is not found in the Constitution of the United States, recommendation B would be unenforceable.. The short of it is, that recommendation B seeks changes in our constitutional system without the trouble of constitutional amendment.

Tribal Land Claims, Statutes of Limitations, and Passamoquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975)

The status of tribal claims to land is best understood by referring to the authority under which the claim is made. In general, a claim would be made under (1) aboriginal possession, (2) executive order, or (3) treaty or statute.

Because discovery gave exclusive title to those who made it, fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign. *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823); *Oneida Indian Nation of N.Y. St.* v. *County of Oneida, N.Y.*, 414 U.S. 661, 94 S. Ct. 772, 777 (1974). It was recognized, however, that the Indians had a right to occupy the lands until their possessory right was extinguished by the United States. That right, based upon aboriginal possession, is frequently called Indian title and is good against all but the sovereign. *Id.* But Indian title is mere possession and not ownership and can be terminated by the United States without compensation under the 5th amendment. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279, 285 (1955). The power of Congress to extinguish Indian title based on aboriginal possession is supreme. The manner, method, and time of such extinguishment raise political not justiciable issues. *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 62 S. Ct. 248, 252 (1941).

Similarly, an Indian reservation created by Executive order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 69 S. Ct. 968, 979 (1949). To the same effect is *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 330 (1942). This is so because article IV, § 3 of the United States Constitution confers upon Congress alone the power to dispose of property belonging to the United States. Id.

Where, however, lands have been reserved for the use of Indians by the terms of a treaty or statute, and the Congress has declared that thereafter Indians were to hold the lands permanently, the tribe must be compensated under the 5th amendment if the lands are subsequently taken by the United States. *Sioux Tribe of Indians* v. *United States*, supra, 316 U.S. at 326. *Tee-Hit-Ton Indians* v. *United States*, supra, 348 U.S. at 277–78. *Hynes* v. *Grimes Packing Co.*, supra, 337 U.S. at 103–104.

The status of tribal land now begins to take form. The United States owned all the land in fee that Indian tribes claimed or now claim based upon aboriginal possession or Indian title, subject only to tribal possessory rights. These lands, therefore, were public lands under article IV, § 3 of the Constitution. It is only when Congress gives this land back to the tribe by treaty or statute that compensation is due under the 5th amendment upon a subsequent taking. *See also*, *Spalding* v. *Chandler*, 160 U.S. 394, 16 S. Ct. 360, 364 (1896); *Jones* v. *Meehan*, 175 U.S. 1, 20 S. Ct. 1, 4 (1899); *Northwestern Bands* v. *United States*, 324 U.S. 335, 65 S. Ct. 690, 692 (1945).

Recall that Indians were incapable of conveying land based on aboriginal possesion (Indian title), because they did not own them—ownership was in the United States. *Johnson* v. *M'Intosh*, supra. Even before *Johnson* v. *M'Intosh*, Congress prohibited the alienation of lands occupied by Indians except pursuant to the authority of the United States. Act of July 22, 1790, ch. 33, 1 Stat. 137. Subsequent Nonintercourse Acts. (1 Stat. 329, 1 Stat. 469, 1 Stat. 743, 2 Stat. 139, 2 Stat. 829, culminating in the Intercourse Act of 1834, 4 Stat. 729) continued this prohibition against alienation but each of the Acts has variations and, therefore, resort to 25 U.S.C. § 177 is not enough. Resort must be had to the specific Nonintercourse Act in effect at the time aboriginal possession was extinguished.

I have capsulized the law applicable to the status of Indian lands or Indian possessory rights, for but one purpose. Contemporary Indian claims based on aboriginal possession have, no doubt, been a great surprise and shock to the American people. Such claims cannot be asserted against the United States for a variety of reasons. In the first place, Indian title is not good against the sovereign United States. In the second place, the Nonintercourse Acts culminating in 25 U.S.C. § 177 are not applicable to the United States or its licensees. *Federal Power Com'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543, 555 (1960). And finally, all pre-1946 claims not brought before the Indian Claims Commission under the Act of August 13, 1946, ch. 959, 60 Stat. 1949, amended and codified in 25 U.S.C. § 70 et seq., prior to 1951 have been forever barred by section 12 of the Indian Claims Commission Act. Indeed, section 12 provides that "no claim existing before such date [August 13, 1946] but not presented within such period [5 years] may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress."

But entities other than the United States have no such protection against ancient and stale Indian claims based on aboriginal possession. Thus it was that the Passamaquoddy Tribe in the State of Maine sought the aid of the United States in suing the State of Maine for Maine's alleged interference with the tribe's aboriginal possessory rights, Maine allegedly not having complied with the Nonintercourse Act as far back as 1794. *See generally*, *Passamaquoddy Tribe* v. *Morton*, 528 F. 2d 370 (1st Cir. 1975). Ordinarily, in this country, the assertion of ancient claims is barred either by applicable statutes of limitations, or by the doctrine of laches. But these impediments are not ordinarily applicable to Indian tribes or the United States.

Now 28 U.S.C. § 2415, which contains various periods of limitation for actions brought by the United States on behalf of various Indian tribes, is uncertain in its effect. In the first instance, it is applicable against the United States. It may or may not be applicable to Indian tribes. In the second instance, it refers to recognized tribes. Third, it is expressly not applicable to actions which seek to establish title to or the right to possession of real or personal property. Accordingly, existing statutes of limitations are inadequate as a bar to the constant and perpetual assertion of stale claims by Indian tribes.

The assertion of stale claims which upset certainty in the area of real property law and centuries of expectations, and shock the conscience, cannot be countenanced by our legal system. Just as the Indian Claims Commission Act ended with finality the assertion of stale claims by tribes against the United States, similar legislation is needed to bar the assertion by tribes of all stale claims against all parties. I, therefore, propose a two-pronged approach to solve the problem of stale Indian claims. The first step is for the Congress to adopt legislation which extinguishes for all time all tribal or Indian claims to interests in real property, possessory or otherwise, grounded on aboriginal possession alone. Indian lands held under treaty, statute, Executive order or deed would not be affected. As pointed out above at length, no compensation is due under the 5th amendment for such extinguishment. This would prevent the assertion of such claims on and after the date of the enactment of such legislation. I see this as essential to the orderly administration of justice in this country.

To ensure that such legislation would extinguish claims such as the Passamaquoddy's now asserted but not yet reduced to judgment, I would resolve all doubt by recommending to the Congress the enactment of a statute of limitations that all such claims not yet reduced to judgment shall be forever barred. This would bar the Passamaquoddy or similar claims and deny to the Passamaquoddy and other similar litigants any right to damages from any parties for trespass on possessory rights. Neither the Passamaquoddys whose possessory rights may have been interfered with, nor the people of the State of Maine or Massachusetts who may have dealt with them in the absence of Federal treaty, are now alive. There is nothing unfair about denying the descendents of the Passamaquoddys a windfall and preventing the imposition of a bizarre and unjust burden on the descendents of the people of the States of Maine and Massachusetts.

It seems to me that this is the correct solution because history clearly shows that the tribes for almost 200 years acquiesced in their land transactions with Maine and that the Congress had ratified Maine's and Massachusetts' actions. We must not be unmindful that "the architect of contemporary law is always contemporary fact." L. Friedman, A History of American Law 178 (1973).

DEFINITIONS: TRIBE AND INDIAN: NEED FOR FINALITY

Because the Constitution grants to the Congress the power to regulate commerce with Indian tribes, article I, § 8, the recognition of Indians as a tribe, i.e., a separate policy, is a political question for the Congress to determine, and its determinations are not subject to judicial review unless the Congress were to heedlessly extend the label of Indian in an arbitrary way. *Baker* v. *Carr*, 369 U.S. 216, 82 S. Ct. 691, 709–10 (1962). But since the Congress cannot bring a community or a body of people within the range of its power over Indian affairs by arbitrarily calling them an Indian tribe, Id. at 710, neither can a tribe. The questions "who is an Indian" and "what is a tribe" have no meaning in the abstract. The questions have meaning in law only in the context of the congressional exercise of its powers under article I, § 8. Whatever its nonarbitrary exercise of that power is, is the answer to the questions. Hence, in any given context, resort must be had to the relevant treaties or statutes by which the Congress has made its declaration.

The Commission fails to appreciate this fundamental principle of constitutional law. By chapter 3, the Commission asserts that an Indian is a person recognized as an Indian by his or her tribe or community unless Congress has expressly provided to the contrary. Now it may well be that an Indian tribe may refer to this or that person as a member. But such definitions or declarations have no consequence unless the Congress specifically recognizes such declarations under its constitutional power. It is for the Congress to say who is an Indian and what is a tribe for purposes of Federal Indian law and policy. Assuming the promulgation of adequate standards, the Congress may well have the power to delegate this power to the various Indian tribes. But in the context of the Commission report, this would not be a wise policy. American Indians would be entitled to a variety of Federal benefits because they are Indians. That being the case, Congress has a special interest in not delegating its definitional power to Indian tribes. If the people of the United States are to distribute their largess, then the United States must be responsible for its distribution. I would also recommend a limitations period, such that after a reasonable date certain, no person or entity would be permitted to assert that it is an Indian or a tribe for Federal purposes. Failing to do this, the Commission's recommendations could result in an open ended raid on the Federal treasury.

The definitional mechanism with a limitation period must be used with respect to any creation of new obligations on behalf of the United States, such as those recommended by the Commission to extend social welfare services to off-reservation Indians (ch. 9) to restore terminated tribes (ch. 10) and to recognize nonrecognized Indians (ch. 11).

MANAGEMENT OF PROPERTY RIGHTS TO WHICH INDIANS ARE ENTITLED BY TREATY BUT WHICH EXIST OFF THE RESERVATION

It is axiomatic that the extent of a tribe's power to govern its own members is limited to the territorial boundaries of its own reservation. And, absent express Federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory State law otherwise applicable to all citizens of the State. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 93 S. Ct. 1267, 1270 (1973). But note that the Congress has the power to immunize reservation Indians from the application of State law off the reservation. But the fact that the Congress has the power to immunize reservation Indians from the application of State law to them when they go beyond reservation boundaries, does not mean that the tribe has the power to apply its law to its members off the reservation. One would ordinarily associate Federal preemption with Federal jurisdiction. But the United States Court of Appeals for the Ninth Circuit in the case of *United States* v. *Washington*, 520 F. 2d 676 (9th Cir. 1975), cert. denied, 96 S. Ct. 877 (1976), has leaped from Federal preemption of State regulation of Indian fishing at treaty fishing grounds off the reservation, to tribal regulation of its members off the reservation in the area of Federal preemption. (Though footnote 4, 520 F. 2d at 686–87, is unclear, the opinion of the District Court in *United States* v. *Washington*, 384 F. Supp. 312, 410 (W.D. Wash. 1974), made it clear that a self-regulating tribe had no authority over nonmembers.).

Now, it is one thing to say that a Federal treaty grants to an Indian tribe property rights off the reservation. It is quite another thing to say, where the treaty says nothing of the kind, that a tribe may exercise governmental powers off the reservation to enforce its off reservation property rights. The result is wholly unsupported in the law. It is as though a court were to hold that property belonging to the State of Washington, but located in the State of Oregon, could be regulated by the State of Washington. Obviously Washington's police and regulatory power does not extend beyond its boundaries. So too, a tribe's self-regulatory power does not extend beyond its boundaries. The protection of a tribe's off reservation property rights is to be accomplished under the law of the State in which the property is located. If the tribe has federally protected property rights off the reservation, then it is the duty of the State to enforce those rights. Indeed, if the State does not enforce those rights, then it is within the power of a Federal or State court to enforce those rights. But it is not within the power of a Federal or State court to grant to an Indian tribe regulatory powers beyond the boundaries of its reservation.

In any event, the scheme established by the United States Court of Appeals for the Ninth Circuit is unworkable. Accordingly, I recommend to the Congress appropriate legislation which makes it clear that Indian tribes exercising powers of self-government not only have no authority over non-Indians, but also have no governmental or regulatory authority outside of their reservation boundaries over their own members. Such legislation does not affect treaty rights or tribal property rights located off the reservation. But it would preserve intact the concept that a governmental unit's regulatory powers are no broader than its territorial boundaries.

CONCLUSION

Those of us who sponsored and supported the legislation to establish the American Indian Policy Review Commission conceived of it as a vehicle to study and recommend to the Congress a coherent, stable and lasting national policy toward American Indians. Unfortunately, I fear we have missed that opportunity.

We have missed it because the valid and achievable recommendations of the Commission will be lost in a cloud of controversy over others which are neither legally sustainable nor politically achievable.

The Commission recommendations for restructuring the Bureau of Indian Affairs are thoughtful and constructive. The many recommendations which call for greater participation by Indians in decisions affecting their lives deserve the support of the American people and the attention of the Congress. Such valuable recommendations abound in this report.

However, much of the report is neither legally nor historically accurate. Most of the inaccuracy springs from the initial erroneous conclusions regarding sovereignty, jurisdiction, and trust responsibility. These very basic and fundamental errors permeate and taint almost every part of the report.

Indian tribes, because of the misapplication of total sovereignty, become super-governments possessing all authority and powers not expressly forbidden them by Congress.

Tribal governments, because of the mistaken scope of the Commission's recommendations regarding jurisdiction, hold sway over the lives and fortunes of many who have no representation in the governing body which makes decisions affecting their lives.

An unduly broad and unwarranted extension of the trust responsibility leads to special obligations in health, welfare, education, and tribal government. The same broad interpretation would result in the extension of heretofore nonexistent legal obligations to off-reservation Indians, terminated tribes and nonfederally recognized Indians.

As a legislator I must say that many of the recommendations have absolutely no chance of being enacted into law. That is because they are oblivious to political reality. The combined effect of a number of recommendations and findings constitutes a degree of separatism which this country is totally unprepared to assume. Some of the recommendations and findings are inimical to concepts we hold sacred as American citizens.

So in the headlong flight to preserve the uniqueness of the American Indian, the Commission recommendations go too far and in my view threaten the existence of the very thing we seek to preserve. The quickest and most certain way to destroy that uniqueness is to immediately implement all the recommendations of this Commission. The backlash of the dominant culture would be swift and sure.

Even in the absence of backlash, subjecting the non-Indian majority to Indian jurisdiction will effectively destroy the uniqueness of Indians. The majority would then have a stake in the exercise of power which would be irresistible. Congress would have no choice but to closely supervise Indian governmental decisions in a way that would totally frustrate the very purpose of giving Indians governmental powers in the first instance.

That would be unfortunate. While it may have been necessary at one time to pursue the melting pot theory in this Nation, we are now big enough, strong enough, mature enough and hopefully wise enough, to countenance and even encourage diversity in our culture.

The American Indian has a very rich and unique culture. He should be given every opportunity to practice that culture. But the American Indian is also an American citizen. He lives among American citizens. Ways can be found to prevent the collision of his uniqueness as an Indian and the rights of other Americans, including Indians, under the Constitution.

Legislation, such as the Indian Self-Determination Act, which promotes separateness, should receive priority by the Congress if that is what Indians want. Substantial decisionmaking by Indians over events which control their lives should be allowed. Legislative action should come from a sincere and realistic desire to continue the special relationship between Indians and the Federal Government. But we must not legislate out of a sense of guilt or excessive zeal to cure all the sins and inequities of the past. Distorting the present and future to atone for the past cannot be the basis of a stable and enduring policy.

The United States is prepared to accommodate Indian interests, and to provide a substantial degree of self-determination. But there is a point beyond which it cannot go—our federal framework will not be compromised, nor will the rights of non-Indians be ignored. Where tribal aspirations collide with constitutional values, the tribe's interests must yield. Nor can the rights of the non-Indian majority be compromised to support tribal aspirations. Doing justice by Indians does not require doing injustices to non-Indians.

SEPARATE VIEWS OF SENATOR JAMES ABOUREZK, CHAIRMAN OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

SEPARATE VIEWS OF SENATOR JAMES ABOUREZK, CHAIRMAN OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

The Vice Chairman of the Commission, Congressman Lloyd Meeds, has issued a strong dissent to the Commission's Majority Report and Recommendations. I have no quarrel with his right to do so. Were his dissent merely a statement of disagreement with the report's recommendations, I would perceive no need to make this additional response. The Commission's Final Report stands on its own as a comprehensive and objective statement regarding the status of the United States Government's relationship with Indian tribes and individuals. The arguments advanced in the brief prepared by the Vice Chairman are fully and adequately met by the final report. I firmly believe that any person who compares the objections made in the dissent with the corresponding sections of the final report will come away impressed by the meticulous, thorough, and dispassionate analysis which supports the report, and by the wisdom and fairness of the conclusions it reaches.

I do, however, feel compelled to respond to another and more troubling aspect of the Vice Chairman's remarks. The dissent advocates the extinction or severe limitation of the time-tested doctrines of tribal sovereignity, jurisdiction and trust status. In doing so, it would do away with the basic foundations upon which the structure of federal-Indian relationships have stood, and must continue to stand. These principles are central to the ultimate goal of the American people, that Indian people enjoy fully the rights and benefits of American citizenship while retaining a diverse and identifiable cultural heritage. In addition, the brief for the dissent attempts to undermine the Commission's work by attacking the objectivity and competence of the Commission and its staff, relying on a distorted analysis of the reasons for this Commission's creation. The seriousness of this attack, as well as the partisan fashion in which it is presented, compels me to respond.

The dissent criticizes the report for failing to be "objective." I find this criticism strikingly ironic, given the partisan manner in which the dissent's criticisms are presented. The Vice Chairman has written a legal brief to express his dissenting views. It is an advocate's brief, presenting but one interpretation of fact and law, designed to support a preconceived conclusion. To use such one-sided advocacy as the means of attacking the objectivity of this Commission's work is ill-advised and, I believe, ultimately self-defeating. The dissent's legal analysis of the law regarding sovereignty and jurisdiction is simply wrong; its selective quotation from a handful of the relevant cases misstates the case law and could easily mislead the uncritical reader. In this regard, I merely invite the reader's attention to the corresponding sections of the Majority Report for a more thorough and objective examination of judicial statements on these issues.

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A more serious error is presented by the dissent's assertion that the Commission's work was biased from the start because of the composition of Commission and task forces. I consider this charge indefensible. The Vice-Chairman was the prime sponsor, and manager in the House of Representatives of the legislation which established the Commission's method of operation. The resolution he introduced directed that five of the eleven commissioners be American Indians, and that each of the task forces have a majority of Indian membership. It is unseemly for him now to fault this enabling legislation as making it "inevitable" that the Commission's report be "the product of one-sided advocacy in favor of American Indian tribes." (Dissent, p. 571).

I take the Vice Chairman's complaint that the Commission's recommendations benefit the position of American Indians in our society as an affirmation of the Commission's success in meeting its legislative mandate. The legislation which created the American Indian Policy Review Commission did not call for turning back the clock on progress already made toward the eventual economic and social self-sufficiency of Indians. It specifically directed the Congress to formulate "policies and programs for the benefit of Indian people." It does not follow that anything which benefits the Indian works against the interests of the non-Indian. The dissent does a disservice by assuming that the interests of Indian peoples are different from those of "the United States, the States, and non-Indian citizens." In many instances, these interests converge. Most often, the complex issues which the Commission addressed could not accurately be categorized into "interests" that are necessarily Indian or non-Indian. This shortsightedness in the dissent is critical.

Even if a particular recommendation could be fairly described as "pro-Indian," I would never think that such a recommendation automatically becomes "anti-white." Yet, such an attitude is in constant evidence throughout the dissent, which repeatedly presents the interests of Indians and non-Indians as being in opposition. In an effort such as this report, dependent upon coopeartion and mutual respect, arguments which tend to rekindle the flames of racial mistrust strike me as exceedingly irresponsible. To state that the Commission's recommendations return to Indian people a degree of self-sufficiency and control over their own lives and property is to acknowledge that the Commission successfully followed its Congressional directive; to characterize these recommendations as "favoring Indians" raises the spectre of a racial antagonism and majoritarian domination which I had hoped was buried forever in a shameful past.

The legislative proposals which the Vice Chairman plans to recommend amount to a repudiation of his initial concern for the strengthening of Indian self-determination. A primary reason for the disarray of Indian affairs today is the piecemeal, one-or-two-proposals-at-a-time approach taken by Congresses in the past. This Commission was essentially directed to undertake a comprehensive review of Indian policy then, to use that review as a blueprint to make recommendations on a broad range of issues affecting Indian life. The Commission saw as central to its work the fact that proposed legislation must reflect the interdependence of Indian-related issues. Any legislation must integrate considerations of Indian health, tribal government, tribal jurisdiction, Indian education, tribal sovereignty, the development and protection of resources, and the federal trust responsibility. In short, the Congress must look at the whole picture; the Commission's recommedations are made from that perspective.

Taken individually, one or more of the legislative recommendations advanced in the dissent might seem reasonable. To take them in such a fashion, however, would amount to the piecemeal approach which the Commission was directed to avoid. But far worse would be acceptance of the dissent's recommendations in toto. The "big picture" of Indian life which the dissent's proposals paint for us would mark a return to the worst features of the termination and allotment periods. "Termination", of course, is not a goal explicitly articulated by the dissent. But that would be the sure and practical effect of implementing the series of proposals advanced by the Vice Chairman; eliminating tribal determination of membership, removing tribal tax exemptions, drastically limiting the tribal taxing power, and severely curtailing general governmental powers of the tribes. Adoption of the narrow trust policy advocated by the dissent, together with its recommendations to extinguish tribal claims to aboriginal territory and to empower states to tax and control land-use planning on reservation land, would mark as great a threat to the self-sufficiency of Indian people as did any proposal advanced during the unfortunate "allotment" era.

By turning its back on the goal of economic independence, the dissent would entrench the governmental paternalism which Indian people have worked so hard to eradicate. The ultimate consequence would be the virtual assimilation of Native Americans into the dominant culture, destroying the last vestiges of a distinctively proud and independent way of life. Such a result was not intended by the Congress when it wrote this Commission's mandate. I am confident that the Congress, when passing upon the Commission's response to that mandate, will renew its own commitment to a proud, self-sufficient, and culturally distinct Indian heritage.

SEPARATE VIEWS OF INDIAN COMMISSIONERS: JOHN BORBRIDGE, JR., LOUIS R. BRUCE, ADA DEER, ADOLPH DIAL, AND JAKE WHITECROW OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

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SEPARATE VIEWS OF INDIAN COMMISSIONERS: JOHN BORBRIDGE, JR., LOUIS R. BRUCE, ADA DEER, ADOLPH DIAL, AND JAKE WHITECROW OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

It is our shared conviction that this final report of the American Indian Policy Review Commission will be recognized as an historic document significantly contributing to the orderly development of Federal Indian policy. For the first time in the history of the United States a joint commission of the Congress has conducted an exhaustive analysis of the relationship between the United States and Native American governments and peoples. The fact that five of the eleven members of the Commission were themselves Native American, appointed in accord with Congressional mandate, constitutes a precedent of great importance. It is a reflection of the progressive spirit of fairness predominant in the American society that the Congress could commission a study of this kind, wherein the Indian members have participated equally with the Congressional members in formulating comprehensive recommendations designed to shape a promising future for Federal-Indian relations.

In creating the American Indian Policy Review Commission, the Congress recognized the pressing need for this work. In joining the Commission as representatives of the Indian tribes and their people, we emphatically concurred that this was a matter of great urgency. As set forth in the authorizing legislation, the purpose of the American Indian Policy Review Commission was clear and unmistakable. The Commission was charged with the task of thoroughly reviewing every aspect of the unique relationship which exists between the United States and the Indian tribes against the backdrop of history as well as presently prevailing conditions. Further, the Commission was to specifically formulate comprehensive recommendations which could serve as a framework for future policy developments. In short, the parameters of existing law and policy served as a point of reference beyond which the Commission members, in their collective judgment, were called upon to point the direction.

The work of this Commission, in our opinion, reflects the sincere interest of the Congressional members who have devoted considerable time and attention to the intensive process of reviewing and reconciling in two years the inconsistencies and confusion resulting from two centuries of often conflicting policies. We are convinced that the standards of scholarly analysis and objective methodology applied to the preparation of this report will withstand the most rigorous scrutiny and this monumental work will prove to be of lasting value in the development of legislative remedies and resolutions.

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The 93d Congress, in providing for the establishment of the Commission by Joint Resolution, found that:

> The policy implementing this relationship (U.S.-Indian) has shifted and changed with changing administrations and passing years, without apparent, rational design and without a consistent goal to achieve Indian self-sufficiency; (Preamble, Public Law 93–580)

It is our judgment that the goal of Indian self-sufficiency is indeed a matter of over-riding importance. Every single Indian tribe in this Nation aspires to this goal and we have recommended that, as a policy of the highest priority, the Federal Government should make a concerted effort to assist Indian tribes in their efforts to achieve economic self-sufficiency. There are two elements essential to the ability of all Indian tribes to progress toward economic development and eventual self-sufficiency; self-government i.e., sovereignty and the trust relationship.

Without governmental authority to enact laws regulating natural resource and industrial development or to license and possibly tax commercial activities within reservations, or without the judicial authority to enforce and interpret tribal laws, it is simply not possible for Indian tribes to achieve economic independence. Equally important is the continuing trust relationship between Indian tribes and the United States. The legal incidences of this relationship protect the property and the rights of tribes while symbolizing to the Indian people the guarantee of good faith and honor professed by the United States toward them. The historical experience of the allotment era and the termination period conclusively proves that the direct opposite of self-sufficiency will befall the Indian tribes when the trust relationship is abrogated.

As an experience in policy formulation, our tenure on the Commission has been enlightening for us all. Yet, despite the legal complexities and the confusing range of issues, we have found that the cornerstone of Federal-Indian policy can be stated simply and clearly. From the very beginning of this country, the law has recognized that the Native people in this country possess a right to exist as separate tribal groups with inherent authority to rule themselves and their territory. Although the United States necessarily exercises predominant power, it has time and again bound itself to respect this basic Indian right and has assumed the responsibility to protect the Indian people in the possession of their lands and in the exercise of their rights. Consequently, self-government (i.e., sovereignty) in conjunction with the trust relationship is truly the inheritance of Indian people. Although times and conditions change, the United States' adherence to a policy of continuing to keep faith with the Indians on this fundamental level will always remain the foundation of Federal-Indian policy. This policy underlies the entire range of questions and issues addressed in great depth and detail in the final report of this Commission.

There are many individuals who contributed to the investigative work of the Commission's task forces, each of which submitted separate reports in the fall of 1976, whose efforts deserve acknowledgement. Their task force reports were synthesized by the core staff of the Commission and their entire range of recommendations were presented to us for deliberation, debate and approval or disapproval. This democratic process which combined the political expertise and judgment of the Congressional members of the Commission with the Indian perspective which we represented has resulted in what we feel is a very responsible, balanced and moderate range of positions.

The work of this Commission has not been without a degree of controversy and indeed as the time approaches for the formal submittal of the American Indian Policy Review Commission's report to the Congress, this inevitable controversy continues. In the expectation that the public's perception of the purpose of this Commission, its procedures and of the nature of this report might not be easily or clearly understood, we have determined it appropriate to offer this separate joint statement.

Several considerations stand out as being the most susceptible to confusion and misunderstanding. A central question is the uncertainty as to whether the Commission's role was to unequivocally express the aspirations of Indian people or whether the Commission was to function exclusively as a mechanism to balance Indian interests with potential or actually conflicting interests of the States and non-Indian groups. It has always been our understanding that the Commission is an extension of the national political process of this country's legislative body, the United States Congress. Accordingly, while it was Congress' clear intent that the Commission address those problems perceived by the Indians, the Commission was equally responsible to larger political interests and accountable to the public—just as Congress is. This has, of course, entailed some disappointment in the expectations of Indian people, but this strikes us as an inevitable element of the political process. By the same measure, those whose interests may be in conflict with the economic, social, legal or political interests of the Indians, will undoubtedly find our recommendations do not fulfill their expectations. For example, many Indian tribes aspire to the goal of regaining original treaty boundaries. In its narrative analysis the report recognizes that Federal law has recognized a variety of ways through which the United States has reduced the size of reservations. Under existing laws many tribes are foreclosed from successfully asserting a right to reestablish the original treaty boundaries of their reservations. We have made no recommendation which would enlarge existing legal remedies which tribes are now provided under the law nor have we recommended that any potential right of tribes to regain treaty boundaries be foreclosed.

Similar conflicts surround the question of tribal authority, as now recognized under Federal law, to assert governmental jurisdiction over non-tribal members. The report again recognizes that existing Federal law is in a developing state on this question and we accordingly made no recommendations which would call for legislative action on this issue. An unqualified advocacy position on behalf of Indians would have been to call for a legislative extension of tribal governmental rights. Those who are convinced that Indian tribes should not exercise any authority over non-members, undoubtedly were disappointed that no recommendations called for restricting or curtailing tribal authority which may be presently supported by existing law.

It was our analysis and judgment that legislative intervention has not proved to be an effective or productive manner of resolving such jurisdictional conflicts. Experience has also shown that litigation between tribes and the States or other local units of government has proved to be unsuccessful at resolving satisfactorily these jurisdictional disputes. As the report makes clear, our conclusion was that the most obvious and satisfactory manner of settling jurisdictional/governmental disputes between tribes and States lies in the direction of negotiated settlements and/or intergovernmental agreements. In such a process each government has the opportunity to define the nature and extent of its interests and the resolution of the dispute, by definition, is in the best interests of both parties. In addition, through negotiation and intergovernmental agreements, a degree of flexibility which allows for mutual modification in the event of changed circumstances is achievable in ways which are not possible through the process of litigation or Federal legislation.

The process of analysis which the Commission employed as illustrated above was applied to a wide range of such issues. Although questions of jurisdiction which go to the status of Indian tribes as self-governing political entities, are perhaps the most difficult and controversial in Indian affairs, we would emphasize that this report addressed the entire range of substantive questions in Indian affairs. Our best efforts, as were those of the Congressional members and the Commission staff, were directed at establishing a blueprint for the future development of Federal Indian policy.

As Indian members of the Commission we express our appreciation to the members of Congress who have served on the American Indian Policy Review Commission. Their part in this historic opportunity for the Indian people to participate in the formulation of the United States Indian policy, we believe, will constitute a tribute to their statesmanship. We commend the staff of the Commission for their uncommon dedication to this effort. We are personally aware of the long hours the staff has worked and the tremendous amount of energy that has gone into this report.

It is fitting that this report is presented at a time when the mood of this Nation is to reexamine the past and plan for the future. In this context, the report presents a challenge to the Congress, to the American public and to the Indian people. It is both appropriate and fortunate that the Congress, as the national forum wherein all political interests are represented, is now given the responsibility and the opportunity to formally respond.

As each legislative recommendation is considered by the respective Committees of the House and the Senate, the process of evaluation and public debate will afford another opportunity for all interested parties to express their views. In many respects, this crucible of the legislative process will be a true measure of the American Indian Policy Review Commission's achievements. We remain convinced that this effort will be seen as an historic contribution not only on behalf of the Indian people but on behalf of and to the credit of the American people.

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